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THE

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KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL,

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION

◆

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

HOLT *v.* HEATHERFIELD TRUST, LIMITED, AND ANOTHER.

1942
Jan. 21, 22, 28.

Garnishee order—Sum garnisheed subject-matter of equitable assignment—Priority—Effective date of notice of assignment—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 136.

P. having recovered judgment for a sum of money against the C. company assigned the judgment debt absolutely to the plaintiff in part payment of a debt then due from him to the plaintiff. After the assignment, but before notice thereof had been received by the C. company, the defendants obtained a garnishee order nisi charging the judgment debt:—

Held, that the assignment, even on the assumption that it was made without consideration, was a good equitable assignment, and as the garnishee order only charged property with which the assignor could honestly deal it did not charge the assigned debt which was the property of the assignee.

The date of the notice to the debtor under s. 136 of the Law of Property Act, 1925, of the assignment of his debt, is the date of the reception of the notice by the debtor.

ISSUE in an action.

The plaintiff, Richard Henry Holt, claimed against the defendants, Heatherfield Trust, Ld., and G. & T. Bridgewater, Ld., a sum of money recovered by Samuel Whitmore Partington, their debtor, under a judgment against the Chloride Electrical Storage Co., Ld. The judgment was obtained by Partington on June 14, 1940, and on that day Partington assigned the sum due thereunder to Holt, which assignment Holt received on June 15. On June 15, Heatherfield Trust, Ld., obtained a garnishee order nisi on the same sum, which was served on the Chloride company on June 17. On June 17, the plaintiff sent notice of the assignment to the Chloride company, which was received by the latter on June 18. Heatherfield Trust, Ld. claimed that the assignment to Holt was void and a fraud on them and on other creditors under s. 172 of the Law of Property Act, 1925. Alternatively, they claimed that on June 17, when the garnishee order became effective, the plaintiff's title was incomplete as being an equitable assignment only until notice was given to the Chloride company on June 18, and also, that the assignment, being made without consideration, was of no avail as against the garnishee order. Atkinson J. found that Holt was a bona fide creditor of Partington for money lent. He also found that Partington intended to prefer Holt to the defendants, but held, following *Glegg* v. *Bromley* (1), that the assignment was not fraudulent within 13 Eliz. c. 5 (since repealed by s. 207 and sch. VII. to the Act of 1925 and substantially re-enacted by s. 172 of the later Act).

Morle for the plaintiff.

Geoffrey Lawrence for the defendants.

The contentions of the parties sufficiently appear in the judgment.

Cur. adv. vult.

1942. Jan. 28. ATKINSON J., having stated the facts, and dealt with the contention that the assignment to the plaintiff was fraudulent, continued: The next point is more difficult. It is said that the assignment was ineffective inasmuch as notice of it had not been given before the service of the garnishee order, so that at the date of the service of the garnishee order it was merely an equitable

(1) [1912] 3 K. B. 474.

1942

HOLT v. HEATHERFIELD TRUST, LD.

Atkinson J.

assignment and depended for its efficacy on proof of valuable consideration, and no consideration had been given for it. The mere existence of an antecedent debt is not valuable consideration, but forbearance to sue may be. One or two cases have been referred to in which light has been thrown on the question when the court may draw the inference that the creditor has forgone proceedings in consideration of a promise to assign, or as a result of assignment. There is no evidence in this case of any threat to take proceedings, but I need not determine the difficult question of consideration, because I am satisfied that the validity of the assignment did not depend on its having been given for valuable consideration.

In my view, the authorities establish the following propositions. At common law things in action were not assignable, and an assignee had to go to equity to enforce his claims. If the thing in action was a legal claim, he had to file a bill to compel the assignor to permit him to sue in the name of the assignor, and equity would help him only if he had given valuable consideration for the assignment. Even before the Supreme Court of Judicature Act, 1873, it was said that the doctrine that there could not be an assignment at law of an existing debt had long been exploded. In *Balfour* v. *Sea Fire Life Assurance Co.* (1) Willes J. said (2): "With regard to the "authority cited from Brooke's Abridgement, I should have "thought a much better authority might have been found for "the proposition that a court of equity would prevent a party "from suing upon a security the consideration for which had "failed. The court there seem to have considered that there could "not be an assignment of a debt. That doctrine has, as every-"one must know, [been] long long since exploded, certainly so "long since as the year 1791, and probably two hundred years "before,—as appears from *Master* v. *Miller* (3), where Buller J. "says (4): 'It is laid down in our old books, that for avoiding "'maintenance, a chose in action cannot be assigned or granted "' over to another: Co. Litt. 214*a*, 266*a*, 2 Roll. 45, l. 40. "' The good sense of that rule seems to me to be very question-"' able; and in early as well as modern times it has been so "' explained away that it remains at most only an objection "' to the form of the action in any case'." In *Fitzroy* v. *Cave* (5) Cozens-Hardy L.J. said (6): "There are, however, other

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(1) (1857) 3 C. B. (N. S.) 300.
(2) Ibid. 308.
(3) (1791) 4 T. R. 320.
(4) Ibid. 340.
(5) [1905] 2 K. B. 364.
(6) Ibid. 372.

"choses in action which, though not assignable at common "law, were always regarded as assignable in equity. A debt "presently due and payable is an instance. At common law "such a debt was looked upon as a strictly personal obligation, "and an assignment of it was regarded as a mere assignment "of a right to bring an action at law against the debtor. "Hence the assignment was, with some exceptions which need "not be referred to (see 1 Hawkins P. C., 8th ed., p. 458), looked "upon as open to the objection of maintenance. After a "time the common law courts recognized the right of anyone "who had a pecuniary interest in the debt to sue in the name of "the creditor. This, however, was the limit of their departure "from the old strict rule, so far as I have been able to discover."

I have no need to explore exactly what was meant by this doctrine being "exploded" in the case of a debt, because under the Supreme Court of Judicature Act, 1873, and now by the Law of Property Act, 1925, s. 136, an absolute assignment of a debt of which express notice in writing has been given to the debtor is effectual in law to transfer the legal right thereto. Absence of notice does not affect the efficacy of the transaction as between the assignor and assignee. Until notice be given the assignment is an equitable assignment, but it is an assignment which requires nothing more from the assignor to become a legal assignment. The assignee may himself give notice at any time before action brought, and further than that, even before notice, he may sue in his own name provided that he makes the assignor a party to the action, as plaintiff if he consents, and as defendant if he does not consent. This is made quite clear in *Performing Right Society, Ld.* v. *London Theatre of Varieties, Ld.* (1), where Viscount Cave L.C. said (2): "No action can now be defeated by reason of the misjoinder or "non-joinder of any party; but this does not mean that "judgment can be obtained in the absence of a necessary "party to the action, and the rule is satisfied by allowing "parties to be added at any stage of a case." That case turned on whether an assignment of rights in a proposed musical composition passed a good title to the Performing Right Society as and when the composition came into existence. It was held that there was no right of action for an infringement of copyright unless the composer was joined as plaintiff or defendant. Viscount Finlay put it thus (3): "The society

(1) [1924] A. C. 1.
(2) Ibid. 14.
(3) Ibid. 18.

"became entitled to sue in respect of the interests so acquired, "but their right to sue is subject to the general rule that the "owner of the legal estate should be joined as a party." Lord Sumner pointed out (1) that the matter had been raised and the plaintiffs had been given an opportunity of joining the legal owner; that deliberately the plaintiffs had not taken advantage of that opportunity; that the courts were dealing with the matter in the absence of the legal owner and they could not give the relief prayed. It is elementary, I think, in such a case, because even in a students' book (Snell's Equity, 22nd ed., p. 56) it is laid down quite clearly: "But, if the assignment of "a legal thing in action is only equitable, the original creditor "must usually be joined, as plaintiff if he consents, if not, as "defendant."

Therefore, it seems beyond argument that the absence of notice does not affect the efficacy of the transaction as between assignor and assignee. The Supreme Court of Judicature Act, 1873, relieved the assignee from the necessity of applying to equity for help, and therefore, valuable consideration is no longer necessary. Neither the Act of 1873 nor the Act of 1925 says a word about consideration. It is not suggested that valuable consideration is necessary if there is an absolute assignment and notice is given, but it is contended that, although valuable consideration may be unnecessary if notice be given, it is necessary to give validity to the transaction if notice be not given or until notice be given. If A. holds by way of gift an absolute assignment of an existing debt of which notice has not yet been given, it is said to be unenforceable and invalid. Yet, once A. gives notice, the invalidity is destroyed and the invalid becomes valid. It would, indeed, be strange if mere notice of an invalidity could destroy that invalidity, and, so far from being invalid, the assignment entitles the assignee to sue for the debt assigned even before notice is given so long as he joins the assignor on one side or another. An assignment can operate as an assignment only with regard to an existing legal chose in action. An assignment purporting to assign a future debt can operate only as a contract to assign. It remains a purely equitable assignment which will be enforced like any other contract only if given for value. The assignment with which I am concerned is absolute in form and purports to assign an existing legal debt.

Counsel for the plaintiff contended that, as by s. 136 of the Law of Property Act, 1925, the notice is to operate from the date of the notice, and as the date of the notice was June 17, 1940, the notice must be effectual as from that date and not from the date of its receipt by the debtor on June 18. That point, in my opinion, is bad. Sect. 136 reads as follows: "(1). Any absolute assignment by writing under the hand of the "assignor (not purporting to be by way of charge only) of any "debt or other legal thing in action, of which express notice "in writing has been given to the debtor, trustee or other person "from whom the assignor would have been entitled to claim "such debt or thing in action, is effectual in law (subject to "equities having priority over the right of the assignee) "to pass and transfer from the date of such notice—(*a*) the "legal right to such debt or thing in action." The date of "such notice" is the date of a notice which has been given to the debtor, and refers back to the express notice in writing mentioned earlier in the section. It is express notice in writing given to the debtor, and, in my judgment, the date of that notice is the date on which it is received by or on behalf of the debtor. If it arrives at his place of business and he happens to be away and does not see it personally for a day or two, that would be immaterial. It would be received on his behalf. The date cannot be the date of the notice, because a notice might be written and dated a week before it was posted and it would be absurd to suppose that that would be effective.

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(1) [1924] A. C. 25.

The further proposition which has been established is that a judgment creditor stands only in the shoes of his debtor and can take only that which the debtor can honestly deal with at the time the order nisi is served. Thus, he is not in such a good position as an assignee, who may defeat an earlier assignee by getting his notice in first. Notice is required only for the protection of the debtor or subsequent assignees. If the creditor were in as good a position as the subsequent assignee, it might be that the defendants would come in first, but the cases show that a creditor who has obtained a garnishee order is not in as good a position as a subsequent assignee.

The defendants relied on two cases. The first was *Wigan* v. *English & Scottish Law Life Assurance Association* (1). It is quite plain that the question of valuable consideration was being considered only because the saving clause in the life policy which had been assigned required that the bona fide interests of the third parties must be based on valuable consideration. The question arose in this way. One H. was entitled to a policy of assurance for 5000*l.* on his own life subject to conditions which made the policy void if the life assured died by his own hand, but without prejudice to the bona fide interests of third parties based on valuable consideration. H. owed Wigan 15,000*l.*, and he executed a deed of assignment of the policy to Wigan by way of mortgage to secure the moneys owing. There was, therefore, no consideration for the assignment. No notice of the existence of the assignment was given to the insurance company during H.'s lifetime, and he died by his own hand. A claim was made, and the court held that, as there was no valuable consideration for the assignment within the saving clause in the policy, the action failed. What was said in the argument and the judgment as to the necessity for valuable consideration was not directed to the question whether there could be a good assignment without consideration, but whether there was valuable consideration as required by the terms of the policy itself. The case throws no light at all on the question I have to consider.

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(1) [1909] 1 Ch. 291.

The other case relied on was *Glegg* v. *Bromley* (1). In May, 1909, Mrs. Glegg started an action against one Hay claiming damages for false representation, and in October of the same year she began an action against a Lady Bromley for slander. At that time Mrs. Glegg was indebted to her husband, Captain Glegg, to the extent of about 7000*l.* on the security of mortgages of her property, and she owed large sums to other creditors. In May, 1910, before the action against Hay had been heard, she assigned to the husband all the moneys she might get in the action against Lady Bromley. In June, Hay obtained judgment against her for 218*l.* for his costs in the action against him, and in July Mrs. Glegg obtained judgment for 200*l.* against Lady Bromley. Hay thereupon obtained a garnishee order to attach those damages in respect of the debt due to him for costs, and his claim was met by the assignment to Captain Glegg. The issue was first tried by a master, and he upheld the assignment to Glegg on the ground that, as Mrs. Glegg owed money to her husband, the assignment was for value and the intention to prefer did not prevent it from being bona fide under 13 Eliz. c. 5. The Divisional Court reversed that decision on the ground that the assignment was a fraudulent assignment under 13 Eliz. c. 5, an antecedent debt not being valuable consideration within the proviso.

(1) [1912] 3 K. B. 474.

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The Court of Appeal upheld the decision of the master, and laid down three propositions: first, that the assignment was not fraudulent and void within the statute, because it was not a mock assignment under which the assignor reserved some benefit for herself, and there was no need to prove consideration in order to rely upon the proviso; secondly, since the assignment was of future property it could only operate as a contract to assign when the property came into existence, and, since a contract without consideration will not be enforced, the assignment did require consideration to have legal operation; and thirdly, the law, if it possibly can, will infer forbearance to sue where the assignment has been made to an existing creditor and in that case the inference was in fact drawn. Words which were clearly used with reference to an equitable assignment of a future debt are sought by counsel for the defendants to be referred to the case of an assignment of an existing debt. Vaughan Williams L.J. dealt mainly with the question of consideration, but he said (1): "Upon these grounds I think that the judgment of the "Divisional Court was wrong, and that the decision of Master "Chitty should be restored—that is to say, the result will be "that this debt which has been sought to be attached by "Mr. Hay as being a debt which was due to his judgment "debtor cannot be so attached.. I think I have already said "that Mr. Hay stands exactly in the shoes of the judgment "debtor, and that if as between her and the assignee, Mr. Glegg, "she could not have questioned his right as against her to this "debt, so neither can Mr. Hay assert anything which Mrs. "Glegg, his judgment debtor, could have been prevented from "asserting." The question whether the assignment was bad under 13 Eliz. c. 5, was dealt with by Fletcher Moulton L.J. (2), and he proceeded to deal with the second proposition (3) thus: "But the counsel who have argued most ably on behalf of "Mr. Hay have raised two further difficulties. They claim "that this was an assignment of future property. In olden "times before the Judicature Act such an assignment would "not be recognized in law. The parties would have had to "go to equity to get it enforced, and equity would not enforce "such an assignment if it was voluntary. Therefore, prior "to the Judicature Act you must have shown that there was "some good consideration for it before it would have had any

(1) [1912] 3 K. B. 484.
(2) Ibid. 485.
(3) Ibid. 486.

"practical operation, and they claim that the same effect "must be given to it now. I am not disposed to disagree "with them in their view of the law. I think that an assignment of future property does require to be something more "than a mere voluntary assignment, a gift, in order that it "may have legal operation." Lastly, Parker J. said (1): "It "is not an existing chose in action, but future property identified "by reference to an existing chose in action. It is, I think, "necessary to bear this distinction in mind, particularly in "view of the course taken by the argument of counsel for the "respondent. Ordinary choses in action were not assignable "at law, but were, generally speaking, assignable in equity "whether themselves legal or equitable choses. In the former "case equity compelled the assignor to allow his name to be "used for their recovery in legal proceedings, in the latter "case the assignee could sue in equity in his own name. There "was one exception to this rule. Equity on the ground of "public policy did not give validity to the assignment of "what is in the cases referred to as a bare right of action, and "this was so whether the bare right were legal or equitable . . . . "It is to be observed that an equitable assignee of a chose in "action, whether it is legal or equitable, could institute "proceedings and maintain proceedings for its recovery. "The question was whether the subject-matter of the assignment was, in the view of the court, property with an incidental remedy for its recovery, or was a bare right to bring "an action either at law or in equity. With regard to the "assignments of future property, they stand, I think, on a "totally different footing. Nothing passes, even in equity, "until the property comes into present existence. Only "when this happens can the assignment attach and an interest "pass." Therefore he proceeded to consider the question whether there was valuable consideration, and decided that there was and that, therefore, the husband's rights prevailed. I cannot see that counsel for the defendants in the present case gets any help from that authority.

Those, however, are not the only relevant authorities. In *In re General Horticultural Company. Ex parte Whitehouse* (2), the headnote reads as follows: "A garnishee order under "R. S. C., O. XLV., binds only so much of the debt owing to the "debtor from a third party as the debtor can honestly deal "with at the time the garnishee order nisi was obtained and

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(1) [1912] 3 K. B. 489.

(2) (1886) 32 Ch. D. 512.

"served; consequently it is postponed to a prior equitable "assignment of the debt, even in the absence of notice." In that case a sum of money amounting to 245*l.* was in the hands of the liquidator of the General Horticultural Co. for payment of a debt owing to John Wills. By a memorandum given in June, 1884, John Wills charged this sum in favour of a creditor with the repayment of 81*l.* and that creditor gave notice of his charge. No point was raised about the efficacy of that, but by two memoranda in writing, each dated July 7, 1884, John Wills charged the debt in favour of one creditor of his for 100*l.* and another for 70*l.*, and they neglected to give notice. The question for determination was the validity of these two assignments. Whitehouse, who was claiming this sum under a judgment recovered a fortnight or so after the two assignments, gave notice to the official liquidator, so that (as in the present case) the dispute was between a judgment creditor who had given notice and two assignees who had failed to give notice. Chitty J. said (1): "The "Common Law Procedure Act, 1854, is, so far as attachment "of debts is concerned, in pari materia with 1 & 2 Vict. "c. 110 [the Judgments Act, 1838] and as to a charging order "under these latter Acts it has now been settled that it charges "only what the judgment debtor can himself honestly deal "with; that rule is now settled. Order XLV. is in pari materia "with both the Acts I have mentioned. It is argued by "Mr. Browne that I ought not to apply the well-settled rule to "this case. But I see no reason why any Act of Parliament "or Rules of Court should be so interpreted as to make a man "do a dishonest act, and yet if I were to allow Mr. Browne's "argument the judgment creditor would obtain, not the "property of the judgment debtor, but that of someone else. "The court cannot arrive at such a conclusion unless the Act "of Parliament compels it to do so. It was considered at one "time that the court could, under the wording of 1 & 2 Vict. "c. 110, arrive at the conclusion contended for by Mr. Browne, "and in *Watts* v. *Porter* (2) one of the common law courts "actually did arrive at that curious conclusion, but on the "question being reconsidered in subsequent cases the law was "set right. The principle, which is well stated in *Hirsch* v. "*Coates* (3) as long ago as 1856, applies in full force to O. XLV., "and it is upon this principle I propose now to act. The

(1) 32 Ch. D. 515.
(2) (1854) 3 E. & B. 743.
(3) (1856) 18 C. B. 757.

"assignment and charge from Wills to Hillier and Segar is "binding and good as between assignor and assignee, and the "equitable doctrine of notice only comes in as between incumbrancers. As between two incumbrancers the court "looks at the equitable position of the two claimants, and "holds that as between them the first assignee, by omitting "to give notice of his charge has enabled the assignor to deal "with the fund as if he were still the owner, and thus to "commit a fraud upon the subsequent assignee, and consequently must be postponed: the first assignee had been "negligent, the second diligent, and therefore the second "assignee was allowed for his diligence by being first to give "notice, to rank first."

The next authority was *Badeley* v. *Consolidated Bank* (1), in which it was decided that "a creditor can only attach by a "garnishee order such property of his debtor as the debtor "could deal with properly and without violation of the rights "of other persons. Therefore an equitable charge, obtained "before a garnishee order, takes priority of the order, even "where no notice of the charge was given." That is on the same lines as *In re General Horticultural Co.* (2). In neither of those cases was a word said about the necessity for consideration. It is put broadly that the garnishee order is postponed to a prior equitable charge. I can find in them no suggestion of any limitation of that proposition.

The precise point was dealt with by Sargant J. in *In re Westerton* (3). In that case about a year before his death the testator had handed to his landlady, a Mrs. Gray, a deposit receipt for 500*l.* deposited with his bank and an order in writing signed by him directing the bank to pay her this sum of 500*l.* on deposit and also a letter addressed to her saying: "You "have been very kind to me, and I desire to make some return "by giving you the amount of 500*l.* now on deposit at [such "and such] bank, as per receipt enclosed." He handed her an envelope saying: "I'll keep it for you," and he took it back and put it in his safe, where it was found after his death. He had left a will by which he left all his estate elsewhere, and the question was whether this was a valid and complete gift to Mrs. Gray. Obviously, there was no consideration, and notice had not been given. Sargant J. held that Mrs. Gray's title was good. The headnote reads:

(1) (1888) 38 Ch. D. 238.
(2) 32 Ch. D. 512.
(3) [1919] 2 Ch. 104.

"The effect of" [the Judicature Act, 1873, s. 25, sub-s. 6] "has been to improve the position of the donee of a legal "chose in action by enabling him to sue at law in his own "name as assignee without regard to the question whether "the assignment was or was not made for valuable considera-"tion." In his judgment Sargant J. said: (1) "Another "point which I ought to mention is that no notice of the "assignment was given to the bank at the time; but it was "not disputed by Mr. Paterson that the mere omission to give "notice at the time was of no consequence so long as notice "was given before action brought. That omission in no way "affected the efficacy of the assignment as between the donor "and the donee, though, if the bank, having had no notice "of the assignment, had paid the money to the testator, that "payment would have been a good payment as against the "donee . . . . It seems to me, though I am not sure that "it was completely admitted by Mr. Gover, that apart from "the Judicature Act, 1873, s. 25, sub-s. 6, the want of con-"sideration would have been fatal to Mrs. Gray's claim. "Prior to the Judicature Act, 1873, a legal chose in action "such as this debt could not be transferred at law, and the "assignee of the debt could only have sued in the name of "the assignor, and in the absence of consent by the assignor "or of a binding contract by the assignor to allow the use of "his name, the use of the assignor's name could only have "been enforced by filing a bill in equity and so obtaining an "injunction in personam to allow the use of the name, and "equity would not have granted that relief unless the assign-"ment had been for valuable consideration. But to my mind "the effect of s. 25, sub-s. 6, of the Judicature Act, 1873, has "been to improve the position of the assignee of a chose in "action who satisfies the words of the sub-section, that is to "say, an assignee under an absolute assignment by writing "under the hand of the assignor not purporting to be by way "of charge only, by enabling that assignee to dispense at law "with the use of the name of the assignor and so to dispense "with the circuitous process of compelling the assignor in "equity to allow his name to be used in proceedings by the "assignee. The result of the sub-section is that an assignee "who takes under such an absolute assignment as is there "mentioned can now sue at law in his own name, and I see "no reason why in the present case the assignee should not

(1) [1919] 2 Ch. 111.

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"do so. There appear to me to be two, if not three, decisions "which assist me in coming to that conclusion. The first "case is *Harding* v. *Harding* (1), which was a case at law where "a person taking under a voluntary assignment of an ascertained balance due from trustees was held to be entitled to "sue the trustees directly. The second case is *In re Griffin* (2), "decided by Byrne J. in 1898, which is in many respects a "case very much like the present. There there had been a "gift of a banker's deposit receipt with an indorsement by "the donor on the back, and the learned judge held that that "was a good equitable assignment of the amount on deposit "at the bank. It is quite true that in that case there was a "second ground on which the learned judge said that the "donee was also entitled to succeed—namely, that he had "been appointed executor of the donor, and that therefore "the transaction fell within the decision of *Strong* v. *Bird* (3). "It is quite clear however from his judgment that the learned "judge would have reached the same conclusion apart from "that second ground, and the first reason which he gave for "his decision is in my opinion completely applicable to the "present case. The third case which is in some respects "similar to the present is *In re Williams* (4), where it was "held that the alleged assignment was bad as being conditional "and future. It is to be noticed however that the assignment "in that case was an assignment without consideration, and "if the question of consideration was essential there was a "very simple means of arriving at the conclusion at which "the Court of Appeal arrived without the necessity of going "through the difficult questions arising in that case as to the "real meaning of the documents. It appears to me that the "Court of Appeal really assumed in that case—without, I "agree, actually deciding the point—that the voluntary "character of the assignment was not fatal to its efficacy."

I would like to refer to one passage of the judgment of Warrington L.J. in *In re Williams* (4). In that case, as Sargant J. said, the question was whether there was an assignment. The words of the document relied on were these : "I authorise . . . . "my housekeeper, and no other person to draw this insurance "in the event of my predeceasing her this being my sole desire "and intention at time of taking this policy out and this is "my signature." It was decided that that did not constitute

(1) (1886) 17 Q. B. D. 442.
(2) [1899] 1 Ch. 408.
(3) (1874) L. R. 18 Eq. 315.
(4) [1917] 1 Ch. 1.

an assignment. It was regarded as a somewhat difficult point. As Sargant J. said, however, in *In re Westerton* (1) there was a very simple answer if valuable consideration was necessary to support an equitable assignment. The Court of Appeal assumed that, if the document had in form been an assignment, it would have been good. Warrington L.J. said (2) : "Claiming "as she does as a volunteer and alleging that the assignor "made this gift to her, she can only succeed if she can show "that the assignor did everything which according to the "nature of the property comprised in the assignment was "necessary to be done in order to transfer the property and "render the assignment binding upon him."

Bearing in mind these two results, first, that the assignment was a perfectly good equitable assignment, which could be turned into a legal assignment at any moment by giving notice, and which without notice, the assignee could have sued upon so long as he joined the assignor as defendant, and, secondly, that a judgment creditor is in no better position than the assignor and cannot garnishee anything which the assignor could not honestly deal with, it seems to me perfectly clear that the plaintiff's title is a good one, and I so decide. I hold that his claim to the money is good.

Judgment for plaintiff.

Solicitors for plaintiff : *Warmingtons.*
Solicitors for defendants : *Thompson & Co.*

(1) [1919] 2 Ch. 112–113.

(2) [1917] 1 Ch. 8.

W. L. L. B.

C. A.

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Feb. 13, 16, 25.

REX v. SECRETARY OF STATE FOR HOME AFFAIRS.

Ex parte BUDD.

Emergency legislation—Detention of person—Membership of organization sympathetic with enemy—Belief of Home Secretary—Cause for belief—Powers of court—Habeas corpus—" Truth of facts set forth " in return "—Habeas Corpus Act, 1816 (56 *Geo.* 3, *c.* 100)*—Release of person through non-compliance with conditions of lawful detention—Re-detention on same grounds after conditions complied with.*

The decisions in *Liversidge* v. *Anderson* [1942] A. C. 206, and *Greene* v. *Home Secretary* [1942] A. C. 284, that it is not open to the court to inquire into the reasonableness of the belief of the Home Secretary that a person whom he has ordered to be detained under reg. 18B (1.) of the Defence (General) Regulations, 1939, is of hostile associations and that by reason thereof it is necessary to exercise control over him, apply equally where the detention order is made under reg. 18B (1A) of the regulations on the ground that the person detained has been a member of an organization sympathetic with the system of government of an enemy.

Where a person detained under reg. 18B (1A) applies for habeas corpus, the court, in exercising the power conferred on it by s. 3 of the Habeas Corpus Act, 1816, to " examine into the truth of " the facts set forth in the return," cannot inquire into those matters in respect of which the Home Secretary states that he has reasonable cause for belief.

The fact that the court has ordered the release of a person detained under reg. 18B (1A) because the prerequisites of a lawful detention have not been complied with does not prevent a second order for detention of the same person on the same grounds when these prerequisites have been complied with.

Correction by Goddard L.J. of a passage in his judgment in *Rex* v. *Home Secretary. Ex parte Greene* [1942] 1 K. B. 87, 113.

APPEAL from the Divisional Court.

On June 11, 1940, an order was made by Sir John Anderson, then Home Secretary, under reg. 18B (1A) of the Defence (General) Regulations 1939 (1), against a number of persons, including the applicant, Charles Henry Bentinck Budd, on the ground that he had reasonable cause to believe that they had been or were members of and active in the furtherance of the objects of an organization as respects which he was satisfied "(*a*) that the persons in control of the organization "have or have had association with persons concerned in the "government of, or sympathies with the system of the government of a power with which His Majesty is at war, and "(*b*) that there is danger of the utilization of the organization "for purposes prejudicial to the public safety, the defence of "the realm, the maintenance of public order, the efficient "prosecution of a war in which His Majesty is engaged, or "the maintenance of supplies or services essential to the life "of the community." Documents which purported to be copies of the detention order were delivered to the police and to the applicant in connection with his arrest which took place on June 15, 1940, but by a mistake these documents made it appear that the detention order had been made under reg. 18B (1.) and was based on the persons there named being persons of hostile associations. The applicant applied for a writ of habeas corpus, and on May 27, 1941, the Divisional Court (Humphreys, Singleton and Tucker JJ.) made an order for his release. On June 5, 1941, an order was made by Mr. Herbert Morrison, the Home Secretary, under reg. 18B (1A) for the detention of the applicant on the ground that he had been a member of and active in the furtherance of the objects of an organization as respects which he was satisfied of the matters set out in the first order, and on June 6 the applicant was again arrested. On a further application for a writ of habeas corpus the applicant made an affidavit in which he stated that he had done nothing since his release on May 27, 1941, to give any ground for his detention, and submitted that, as the British Union of Fascists had ceased to exist as the result of an order made by the Home Secretary under reg. 18AA on July 10, 1940, the Home Secretary could not have been satisfied that there was any danger on June 5, 1941, of the utilization of the British Union for purposes prejudicial to the public safety, etc., and that neither the former nor the present Home Secretary had any reasonable cause for believing that it was necessary to exercise control over him. The Home Secretary stated in an affidavit that when he made the detention order he had reasonable cause to believe the applicant to have been a member of and to have been active in the furtherance of the objects of the British Union, and that he was satisfied that the statements made with regard to that organization in the detention order were true. Before he made the order he carefully studied reports and considered information coming from persons in responsible positions who were experienced in investigating matters of the kind and the report of the advisory committee made when the applicant was previously interned, and he had information of the applicant's membership of the British Union, his collaboration with those in control of it, and acts by him in furtherance of and in sympathy with its objects after he had become an officer in His Majesty's Forces during the war and had reasonable cause to believe what was stated in the detention order. The Divisional Court (Viscount Caldecote C.J. and Macnaghten J., Stable J. dissenting) dismissed the application. The applicant appealed.

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(1) Reg. 18B: " (1A) If the Secretary of State has reasonable " cause to believe any person to " have been or to be a member of, " or to have been or to be active " in the furtherance of the objects " of, any such organization as is " hereinafter mentioned, and that " it is necessary to exercise control " over him, he may make an order " against that person directing " that he be detained. The organizations hereinbefore referred to " are any organizations as respects " which the Secretary of State is " satisfied that either—(*a*) the " organization is subject to foreign " influence or control, or (*b*) the " persons in control of the organization have or have had " associations with persons concerned in the government of, or " sympathies with the system of " government of any power with " which His Majesty is at war, " and in either case that there is " danger of the utilization of the " organization for purposes prejudicial to the public safety, " the defence of the realm, the " maintenance of public order, the " efficient prosecution of any war " in which His Majesty may be " engaged, or the maintenance of " supplies or services essential to " the life of the community."

Scott Henderson for the applicant. The detention of the applicant is bad. When, on June 5, 1941, the order for the re-arrest of the applicant was made, there was no danger of the British Union being used for any of the prejudicial purposes referred to in reg. 18B (1A). It had ceased to exist as an effective organization for some time before that date, even if it had not been actually dissolved, and the Home Secretary had stated in Parliament that it had been effectively suppressed. To justify the detention of a member of a subversive organization, the danger likely to result from the activities of the organization must exist at the time the order for detention is made. It is not sufficient for the danger to have existed at some previous period. Under s. 3 of the Habeas Corpus Act, 1816, the court has power "to examine into the truth of "the facts set forth in" the return to a writ of habeas corpus. In any habeas corpus proceedings the first question is whether a prima facie case is shown by the applicant that his freedom is unlawfully interfered with, aud the next step is to determine if the return is good and sufficient. The Home Secretary's affidavit in the present case did not show grounds sufficient to justify the applicant's detention. Some such grounds must be shown: *Liversidge* v. *Anderson* (1). The decision in that case, which was an action for false imprisonment, does not prevent the court inquiring into the facts in a case such as this, under the Habeas Corpus Act, 1816. Lastly, no person who has been released by the court following a writ of habeas corpus can be arrested a second time unless fresh grounds for his detention are shown: *Search's Case* (2).

(1) [1942] A. C. 206.
(2) (1588) 1 Leon. 70.

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In the present case there were no fresh grounds for the second detention. When a person has been released by order of the court, that order can never be reviewed: *Cox* v. *Hakes* (1). [He also referred to *R.* v. *Turlington* (2) and *In re Castioni* (3).]

Sir Donald Somervell A.-G. and *Valentine Holmes* for the Home Secretary. The arguments advanced on behalf of the applicant are largely inconsistent with the decision of the House of Lords in *Liversidge* v. *Anderson* (4). The contention that, as the majority of the members of the British Union are detained, there cannot be any danger of the utilization of that organization for any of the prejudicial purposes mentioned in reg. 18B (1A), is a complete fallacy and involves a misconstruction of the regulation. An organization does not cease because some of its members are detained or because an order has been made restricting its activities. The Home Secretary has to direct his mind, first, to the organization and satisfy himself that it is dangerous or under foreign influence. Having satisfied himself of this, he is free to exercise the right to direct the detention of persons who have been or are its members. If, say, five of the members evade arrest on the first "round-up," it cannot be open to them, when arrested some weeks later, to plead that, as all the other members have been arrested, the organization is no longer dangerous. It was further contended that, in view of the applicant's release by order of the court after the first order for detention by the Home Secretary, he could not be detained under a second order. If a man was discharged on certain grounds, the court would not allow him to be detained without some new grounds for doing so, but that has no application here since the majority of the court based their decision on the fact that at the time of the applicant's arrest the document delivered to him did not state the true grounds of his detention so that he was not put into the position required by reg. 18B sub-reg. 4, to enable him to make representations to the Home Secretary.

[They also referred to *Rex* v. *Governor of Brixton Prison. Ex parte Stallman* (5) and *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (6).]

Scott Henderson replied.

Cur. adv. vult.

(1) (1890) 15 App. Cas. 506.
(2) (1761) 2 Burr. 1115.
(3) [1891] 1 Q. B. 149.
(4) [1942] A. C. 206.
(5) [1912] 3 K. B. 424.
(6) (1873) L. R. 5 P. C. 179.

1942. Feb. 25. Lord Greene M.R. read the following judgment of the court (Lord Greene M.R., MacKinnon and Goddard L.JJ.). The applicant was arrested and placed in detention on June 6, 1941, under an order made by the present Home Secretary under reg. 18B (1A) of the Defence (General) Regulations, 1939. It is not necessary to set out the terms of the order or of the regulation under which it was made. It is admitted that the order is regular on its face, that it was duly signed by the Home Secretary, and that the appellant is the person named in it. Before stating and examining the grounds on which the legality of the detention is disputed, it is desirable to make some general observations on the law affecting cases of this kind.

The principles applicable are to be found in two recent decisions of the House of Lords: *Liversidge* v. *Anderson* (1) and *Greene* v. *Home Secretary* (2). The former case arose for decision on the application of the plaintiff for particulars of the defence in an action claiming damages for false imprisonment, the latter on an application for a writ of habeas corpus. In each case the decision was based on the view of the House on the substantial issue involved, namely, whether it is open to any court to inquire into the reasonableness of the belief of the Secretary of State in the matters in which the regulation requires him to have reasonable cause to believe before a detention order can be made. The regulation in question in those cases was reg. 18B (1.), but the principles laid down are equally applicable to cases arising under reg. 18B (1A). The latter regulation is rather more complicated than the former in that the organization referred to in it must be an organization as respects which the Secretary of State is "satisfied" that it complies with one or the other of two descriptions set out in the regulation. It is clear that if the courts have no power to inquire into the reasonableness of the belief of the Secretary of State in the matters in which he is required to believe, they can have no power to inquire into the grounds of his satisfaction in regard to matters of which he is required to be satisfied.

The opinion of the majority of the House on the substantial issue appears clearly from the following extracts from the speeches in *Liversidge* v. *Anderson* (1). Lord Maugham said (3): "The result is that there is no preliminary question of fact

(1) [1942] A. C. 206.
(2) [1942] A. C. 284.
(3) [1942] A. C. 224.

"which can be submitted to the courts and that in effect "there is no appeal from the decision of the Secretary of State "in these matters provided only that he acts in good faith." Lord Macmillan said (1): "I am unable to accept a reading "of the regulation which would prescribe that the Secretary "of State may not act in accordance with what commends "itself to him as a reasonable cause of belief without incurring "the risk that a court of law would disagree with him." Lord Wright said (2): "On the view that I have formed that "there is under reg. 18B no triable issue as to reasonableness "for the court, these authorities cease to be of any value. "As the administrative plenary discretion is vested in the "Home Secretary, it is for him to decide whether he has "reasonable grounds and act accordingly. No outsider's "decision is invoked, nor is the issue within the competence "of any court." Lord Romer said (3): "If at the trial the "Home Secretary gives rebutting evidence to the effect that, "in his opinion, there were reasonable grounds for his belief, "his statement, being merely a statement as to his opinion, "must necessarily have to be accepted unless it can be shown "that he was not acting in good faith, and the onus of showing "this would lie upon the appellant." It is scarcely necessary to say that language used in earlier decisions which may suggest that the courts may inquire into the reasonableness of the belief of the Secretary of State cannot now be regarded as correct.

Much of the argument presented to us on behalf of the applicant consisted in reality of an attempt to establish that the principles on which *Liversidge* v. *Anderson* (4) was decided are not applicable in their full force to cases where the application is for a writ of habeas corpus. In our opinion, this argument cannot be accepted. Apart from the decision in *Greene* v. *Home Secretary* (5), to which we will refer in more detail later in this judgment, it is, we think, clear that the same question arises in both classes of case, namely, on what grounds can the legality of the order be questioned? It is the legality of the order which has to be considered in each case. If the order is lawful, the detention is lawful, with the result that neither an application for a writ of habeas corpus nor an action for damages for false imprisonment can succeed.

(1) [1942] A. C. 257.
(2) Ibid. 269.
(3) Ibid. 278.
(4) [1942] A. C. 206.
(5) [1942] A. C. 284.

In neither case is it admissible to go into matters which are irrelevant to the question of legality. Apart from bad faith, that question is decided once for all by the fact that the Secretary of State has what appears to him to be reasonable cause for his belief and it is not for the courts to inquire into the truth of the matters in which he believes or the reasonableness of his belief in them. A fortiori (if that expression is not inappropriate where the principles are clear) in any matter where the Secretary of State has only to be "satisfied" no inquiry by a court is possible.

It is now convenient to consider in detail the three main arguments presented to us on behalf of the applicant. First, it was said that in view of certain facts it must be obvious that at the date when the detention order was made there could be no danger of the utilization of the organization known as the British Union (of which the applicant had at one time admittedly been a member) for any of the prejudicial purposes mentioned in reg. 18B (1A). The facts relied on were that an order had been made under reg. 18AA applying that regulation to the British Union and that the present Home Secretary had stated in the House of Commons that the organization was effectively suppressed, largely, it would appear, owing to the detention of its most active supporters. Reg. 18AA imposes on organizations to which it is applied a series of restrictions severe enough, provided that they are obeyed, to restrict their activities to a satisfactory extent. The regulation does not purport to dissolve the organizations. Indeed, to speak of "dissolving" such an organization is not apposite. It is true that the court is given power to dissolve an organization, but this is only for the purpose of dealing with its assets and liabilities. With regard to the statement made in the House of Commons (which we allowed to be read to us without ruling that it was admissible), it is enough to say that an organization may well cease to be dangerous if all its members are interned but may become dangerous if they, or perhaps any one of them, are, or is, released. We have dealt with these matters because Mr. Scott Henderson, when pressed, admitted that this branch of his argument (which did not depend on any considerations peculiar to habeas corpus proceedings) really amounted to a submission that the Home Secretary cannot have acted in good faith. The argument, in our opinion, breaks down completely.

The second argument was based on the language of s. 3

of the Habeas Corpus Act, 1816. In cases to which that Act applies, it is open to the court, although the return to a writ of habeas corpus may be good and sufficient in law "to "examine into the truth of the facts set forth in such return." It was said that there were in the present case sufficient reasons for the court to exercise its power of inquiring into the facts. Those reasons were said to be—(*a*) that the applicant had already been released from an earlier detention by order of a Divisional Court and that no fresh grounds for a second detention were alleged; (*b*) that the Divisional Court in the earlier proceedings had decided that the Home Secretary had not had reasonable grounds for ordering the detention then in question; (*c*) that for the reasons already discussed it was at least not obvious that any danger from the British Union was to be anticipated. On these grounds it was said that the court could inquire into the facts stated in the present detention order and in the affidavit of the Home Secretary. Quite apart from the decision of the House of Lords in *Greene* v. *Home Secretary* (1) to which reference will presently be made, it is, in our opinion, clear that the argument is based on a misconception as to the true meaning of the section. The facts into which it was said that we were at liberty to inquire were those matters in respect of which the Home Secretary says that he had reasonable cause for belief and those in respect of which he states that he was satisfied, but, as we have already pointed out, the court is precluded as a matter of law from inquiring into those matters or into the reasonableness of the belief of the Home Secretary or into the grounds of his satisfaction. These matters are not relevant to the question of the legality of the detention and when the section speaks of an examination into the truth of the facts set forth in the return it can only be read as referring to facts which are relevant to the issue before the court, namely, the legality of the detention. It is clear that there may be many matters into which the court can and will inquire under the section if occasion arises, for example, the bona fides of the Secretary of State, the genuineness of the detention order itself, and the identity of the applicant with the person referred to in the order. Similarly, if, for example, a regulation empowered the Home Secretary to detain any person who was in fact an alien, the court could inquire into the nationality of the applicant, since, if it transpired that he

(1) [1942] A. C. 284.

was not in fact an alien, his detention would be ultra vires. In all these instances the court would be inquiring into questions relevant to the matter in hand, namely, the legality of the detention.

But the question is, in our opinion, set at rest by the decision in *Greene* v. *Home Secretary* (1) when read in the light of the principles laid down in *Liversidge* v. *Anderson* (2). In *Greene's* case (1) the applicant had been detained pursuant to an order made under reg. 18B (1.). The validity of the order was assailed on the ground that the Home Secretary never had reasonable or any cause for believing any of the matters in respect of which he stated that he had reasonable cause for belief. It was held that the language of s. 3 of the Habeas Corpus Act, 1816, did not justify the court in inquiring into these matters and that no such inquiry should be made. We need only refer to two passages from the opinions delivered. Lord Macmillan said (3): "The result, in my opinion, is "that the production of the Secretary of State's order, the "authenticity and good faith of which is in no way impugned, "constitutes a complete and peremptory answer to the "appellant's application. It justifies in law his detention in "the absence of any relevant challenge of its validity, and "there is no such challenge." Lord Wright used similar language (4), and later he said (5): "In the present case there "are no facts to inquire into. The only possible inquiry of "fact, when once the authenticity of the order and its application to the appellant is conceded or established, is whether "the Home Secretary had in his own mind what appeared to "his mind to be reasonable cause." It was said that there were expressions to be found in the opinions delivered which suggested that the court had power to inquire into the matters which the present applicant was anxious to have examined and it ought to do so where, as was alleged in the present case, special reasons pointing to the desirability of such an inquiry could be shown. In our opinion, it is quite impossible to spell any such suggestion out of the language used—indeed, to do so would be to negative the whole reasoning on which the decisions in *Liversidge* v. *Anderson* (2) and *Greene* v. *Home Secretary* (1) are based. It is, therefore, unnecessary for us to discuss the allegations relied on as justifying an examination

(1) [1942] A. C. 284.
(2) [1942] A. C. 206.
(3) [1942] A. C. 297.
(4) Ibid. 305–306.
(5) Ibid. 307.

by the court of matters which the court has no power to examine.

There is, however, one of those matters which is relevant in connection with the third and last argument submitted on behalf of the applicant. It concerns the previous detention and release of the applicant and the facts relating to it must be briefly stated. On June 15, 1940, the applicant was arrested and placed in detention under what purported to be an order signed by the then Home Secretary and dated June 11, 1940. That document on the face of it purported to have been made under reg. 18B (1.) since it was based on "hostile associations." One copy of this document was delivered to the police as their authority to effect the arrest and another copy was delivered to the applicant when he was arrested. Now it transpired that no such order had ever been made by the Home Secretary. The document was false from beginning to end, including the statement at the foot that it had been signed by the Home Secretary. This cynical piece of carelessness on the part of departmental officials was severely criticized by the Divisional Court and we need make no further comment on it. It appeared, however, that the Home Secretary had in fact made an order dated June 11, 1940, for the detention of the applicant under reg. 18B (1A) although no copy of that order was given to the constable or the applicant. On the application of the applicant for a writ of habeas corpus a Divisional Court consisting of Humphreys, Singleton and Tucker JJ. ordered his release. The court did not, as was suggested to us, decide that the Home Secretary did not have reasonable grounds for his belief. Humphreys J. referred to a number of matters which it is not necessary to mention here and held that the applicant was entitled to be released because no sufficient care and attention was paid to his individual case by the Home Secretary. He added that he was unable to say on the evidence as a whole that the Secretary of State had reasonable cause to believe that it was necessary to exercise control over him, but in view of the decisions in *Liversidge* v. *Anderson* (1) and *Greene* v. *Home Secretary* (2) this was not a competent finding. Singleton J. referred to the same matters as those on which Humphreys J. had relied, but expressed no concluded opinion on them. He based his decision on sub-reg. 4, since the document which was delivered to the applicant at the time

(1) [1942] A. C. 206. (2) [1942] A. C. 284.

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of his arrest did not state the true grounds for his detention, and he was, consequently, not put in a position to make the representations to the Home Secretary which that sub-regulation entitles him to make. Tucker J. based his judgment on the same point. The argument presented to us was based on the proposition that a person who has been released from custody on a writ of habeas corpus cannot be subjected to a second detention for the same cause. This argument is, in our opinion, misconceived. The first detention of the applicant was illegal in that the prerequisites of a lawful detention had not been complied with. In the case of the present detention, those prerequisites have been complied with and the detention is lawful. The decision in the first case was not on the ground that the real order made by the Home Secretary was one which he had no power in law to make—indeed any such decision would, in view of *Liversidge* v. *Anderson* (1) and *Greene* v. *Home Secretary* (2), have been wrong in law—but on the ground that the terms of that order had not been communicated to the applicant in such a way as to enable him to make his representations to the Home Secretary under sub-reg. 4. There is nothing in principle or in authority to justify the view that the result of the earlier proceedings can assist the applicant in any way. The appeal must be dismissed.

GODDARD L.J. read the following: I desire to take this opportunity of correcting a passage in my judgment in *Rex* v. *Home Secretary. Ex parte Greene* (3). I there said that the prisoner's right to controvert the return to a writ of habeas corpus was expressly preserved by s. 4 of the Act of 1816. This was a mistake. The right of controverting the return was first given by the Act—by s. 3 where the writ was granted by a single judge and by s. 4 where it was granted by the full court. A perusal of the opinion of Wilmot J. (afterwards Wilmot C.J.), delivered in the House of Lords in 1758 (1), when a bill for amending the law relating to habeas corpus was before the House, makes it clear that no dispute on any matter of fact was allowed on a return to the writ and that the only question which could be debated was whether the return disclosed on its face a ground for the detention which was sufficient in law. The reason was that in those days it

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(1) [1942] A. C. 206.
(2) [1942] A. C. 284.
(3) [1942] 1 K. B. 87, 113.

(1) Wilmot's Notes of Opinions and Judgments, pp. 77 to 129.

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was only a jury that could try a question of fact. Accordingly, if the applicant for the writ desired to dispute any fact alleged in the return, he could do so only by an action, or by preferring an indictment, for a false return. If he obtained a verdict, the court would then take notice that the allegation was false and proceed accordingly. It appears from a note at the end of the report of the learned judge's opinion that the bill was rejected, and it was by the Act of 1816 that the law in this respect was first altered.

Appeal dismissed.

Solicitors for applicant: *Oswald Hickson, Collier & Co., for Marsh & Ferriman, Worthing.*

Solicitor for Home Secretary: *Treasury Solicitor.*

H. C. G.

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Ex parte AMAND.

Appeal—"Criminal cause or matter"—Absentee from military service—Remand by magistrate—Application for habeas corpus—Refusal—Appeal to Court of Appeal—Jurisdiction to hear appeal—Army Act, s. 154, *paras.* 1, 3, 4*—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 1 (*a*).

A. was arrested as an absentee without leave from the Royal Dutch Forces in Great Britain, and was taken before a magistrate, who remanded him on bail. A. applied for a writ of habeas corpus, but the Divisional Court refused his application. On appeal to the Court of Appeal:—

Held, on a preliminary objection, that the case came within s. 31, sub-s. 1 (*a*), of the Supreme Court of Judicature (Consolidation) Act, 1925, as being in "a criminal cause or matter," and that, accordingly, the Court of Appeal had no jurisdiction to hear the appeal.

APPEAL from Divisional Court (1).

By s. 1, sub-s. 1, of the Allied Forces Act, 1940, it is provided that when any military forces of any foreign Power allied with His Majesty are, for the time being, present in the United

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(1) [1942] 1 K. B. 413.

Reported by F. R. R. Burford, Esq., Barrister-at-Law.

Kingdom, the military courts and authorities of that Power may, subject to the provisions of the Act, exercise within the United Kingdom in relation to members of those forces in matters concerning discipline and internal administration all such powers as are conferred on them by the law of that Power. Sub-s. 3 provides for the application by Order in Council of certain sections of the Visiting Forces (British Commonwealth) Act, 1933, to any such forces subject to such adaptations, modifications, and exceptions as the order may provide. The Act also by s. 3 provides for the application by Order in Council of the Army Act to the forces of such Powers so that authority is given to British courts martial to try members of those forces. By Order in Council dated October 11, 1940 (St. R. & O. 1940, No. 1818), His Majesty applied to the forces of the Netherlands, among others, certain provisions of the Visiting Forces (British Commonwealth) Act, 1933, with certain adaptations and modifications, including s. 3. Under that section and subject to its provisions paras. 1 to 4 and 9 of s. 154 of the Army Act are applied in relation to a deserter or absentee without leave from any force to which the section applies as they apply to a member of a home military force, and it also provides that no person who is alleged to be a deserter shall be apprehended or dealt with under the section, except in compliance with a general or specific request from his government, and that a person so dealt with shall be handed over to the authorities of that government. It is provided that a certificate under the hand of the Secretary to the Army Council that such a request has been made shall be admissible without proof as evidence of the making of the request, and also that a document purporting to be a certificate of an officer commanding a unit or detachment that a named and described person was at the date of the certificate a deserter or absentee without leave shall be admissible without proof as evidence of the fact so certified. Neither this latter certificate nor the former is made conclusive evidence that the person mentioned is a deserter, but he can show by way of defence that he is not the person named in the certificate, or that he is not in fact a deserter, or that he was absent on leave or on some particular duty, or any other fact that would displace the evidence afforded by the certificate.

On March 12, 1941, a certificate was issued under the hand of the Secretary to the Army Council that a general request had been made by the Officer Commanding the Dutch Military

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Forces in the United Kingdom that any person alleged to be a deserter or absentee without leave should be apprehended and dealt with under s. 3, and on March 13 an officer of the Dutch Army certified that the applicant, Jean Jacques Amand, was a deserter or absentee without leave and requested his arrest, and that he be handed over to a military escort for necessary return to his unit. On March 15, Amand, who had been arrested by a police officer, was brought in custody before the chief magistrate at Bow Street police court, who, on being informed that Amand had already made an application for a writ of habeas corpus, remanded him on bail. The Divisional Court refused the application and the applicant appealed.

Sir Donald Somervell A.-G. and *H. L. Parker* for the Home Secretary, on a preliminary objection. This appeal does not lie, it being from a judgment in a "criminal cause or matter" within s. 31, sub-s. 1 (*a*), of the Judicature Act, 1925 (1). The words "criminal cause or matter" in that paragraph should be given the widest interpretation: *Ex parte Alice Woodhall* (2). The real test is the character of the proceedings which are the subject-matter of the judgment: *In re Clifford and O'Sullivan* (3), where the conditions that must be fulfilled were laid down by Lord Cave as follows: ". . . . In order "that a matter may be a criminal cause or matter it must, "I think, fulfil two conditions which are connoted by and "implied in the word 'criminal'. It must involve the "consideration of some charge of crime, that is to say, of an "offence against the public law (Imperial Dictionary, tit. 'Crime' "and 'Criminal'); and that charge must have been preferred "or be about to be preferred before some court or judicial "tribunal having or claiming jurisdiction to impose punishment "for the offence or alleged offence." Those conditions are fulfilled in the present case. The Court of Appeal has no jurisdiction in a number of cases where the proceedings have not been criminal, in the narrow sense of the term: *Seaman* v. *Burley* (4); see also *Provincial Cinematograph Theatres, Ld.*

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(1) By Supreme Court of Judicature (Consolidation) Act, 1925, s. 31, sub-s. 1: "No appeal shall "lie—(*a*) except as provided by "the Criminal Appeal Act, 1907, "or this Act, from any judgment "of the High Court in any "criminal cause or matter."

(2) (1888) 20 Q. B. D. 832, 835.

(3) [1921] 2 A. C. 570, 580.

(4) [1896] 2 Q. B. 344.

v. *Newcastle-on-Tyne Profiteering Committee* (1). For the present purpose there is no distinction between a crime in the ordinary sense and military offences such as absence without leave. In *Rex* v. *Army Council. Ex parte Sandford* (2) a petition to the Army Council to mitigate, remit or commute a sentence of a court martial was held to be a "criminal cause "or matter" within s. 31, sub-s. 1 (*a*). It is true that the offence in that case was forgery, a crime in the narrow sense of the term, but that makes no material difference. By the combined effect of the Allied Forces Act, 1940, the Visiting Forces (British Commonwealth) Act, 1933, and the Army Act, the applicant was liable to be punished by a military tribunal for the offence of desertion or absence without leave, and the appropriate charge was to be preferred against him.

Sir Patrick Hastings K.C., *G. O. Slade*, and *Victor Wolff* for the applicant. This is not a "criminal cause or matter" within s. 31, sub-s. 1 (*a*), of the Act of 1925. The applicant contends that he never was a member of the Dutch forces, and it cannot be said that a decision on that point is in a "criminal cause or matter." The Allied Forces Act, 1940, and the Visiting Forces (British Commonwealth) Act, 1933, as applied, merely give the Dutch authorities certain rights which are comprised in s. 154 of the Army Act (3). The Dutch authorities merely asked that the applicant should be returned to his unit. There is no evidence that the applicant committed an offence against the law of Holland, or that a charge will be preferred against him before a court or judicial tribunal, and the magistrate has no judicial functions with regard to him. Everything that would prevent his appeal being heard must be strictly established, and that has not been done.

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(1) (1921) 37 T. L. R. 799.

(2) [1940] 1 K. B. 719.

(3) By Army Act, s. 154: "With respect to deserters and "absentees without leave the "following provision shall have "effect:—(1.) Upon reasonable "suspicion that a person is a "deserter or absentee without "leave, it shall be lawful for any "constable, or if no constable "can be immediately met with, "then for any officer or soldier "or other person, to apprehend "such suspected person, and "forthwith to bring him before a "court of summary jurisdiction: "(2.) A justice of the peace, "magistrate, or other person "having authority to issue a "warrant for the apprehension of "a person charged with crime "may, if satisfied by evidence on "oath that a deserter or absentee "without leave is or is reasonably "suspected to be within his "jurisdiction, issue a warrant "authorising such deserter or "absentee without leave to be "apprehended and brought forth-"with before a court of summary "jurisdiction: (3.) Where a "person is brought before a "court of summary jurisdiction "charged with being a deserter "or absentee without leave under "this Act, such court may deal "with the case in like manner as "if such person were brought "before the court charged with "an indictable offence, or in "Scotland an offence: (4.) The "court, if satisfied either by "evidence on oath or by the

Le Quesne K.C. and *McClure* for the Netherlands Ministry of Defence.

1942. Mar. 19. The judgment of the court (LORD GREENE M.R., GODDARD and MACKINNON L.JJ.) was read by GODDARD L.J. In the court below the case was argued on the assumption that the applicant was still in the custody of the police officer, and before us the question was raised whether it is open to a person who has been arrested with a view to being brought immediately before the appropriate court where the question of the legality of his arrest can be heard and determined can apply for a writ of habeas corpus before the court has given its decision, but as this court has no jurisdiction to entertain an appeal relating to a judgment or order in a criminal cause or matter, we give no opinion on this point. Were we to do so we should be expressing an opinion on a matter which this court is precluded by statute from entertaining. At the conclusion of the argument before us we intimated that, in our opinion, the appeal related to a criminal cause or matter and was, accordingly, incompetent under s. 31, sub-s. 1 (*a*), of the Supreme Court of Judicature (Consolidation) Act, 1925, and we will now state our reasons for so holding.

The relevant section of the Army Act applicable to the case by the operation of the Allied Forces Act, 1940, the Visiting Forces (British Commonwealth) Act, 1933, and the Order in Council of October 11, 1940, is s. 154, paras. 1 to 4,

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"confession of such person that "he is a deserter or absentee "without leave, shall forthwith, "as it may seem to the court "most expedient with regard to "his safe custody, cause him either "to be delivered into military "custody in such manner as the "court may deem most expedient, "or, until he can be so delivered, "to be committed to some prison, "police station, or other place "legally provided for the con- "finement of persons in custody, "for such reasonable time as "appears to the court reasonably "necessary for the purpose of "delivering him into military "custody."

and it is clear from these provisions that if a person taken into custody, either under para. 1 or para. 2, is brought before a court, he can raise the issue that he is not a deserter or an absentee. The court must then proceed under the Indictable Offences Act, 1848, and take depositions. If the court is satisfied, it cannot sentence the prisoner any more than it could sentence a person charged with an offence beyond the jurisdiction of justices to hear and determine. It commits him to military custody for the purpose of his trial by military law, just as a civilian prisoner would be committed to assizes or quarter sessions. Being thus committed the prisoner will be dealt with for the offence by the appropriate military tribunal, whether it be his commanding officer or a court martial.

It is, indeed, difficult to see why a matter which begins with an arrest by a constable, with or without warrant, followed by appearance before a criminal court, which can deal with the case under the Indictable Offences Act, 1848, and which may result in the prisoner being remanded to military custody for the purpose of trial is not a criminal matter. Sir Patrick Hastings contended that there was no evidence that desertion or absence without leave was an offence in a soldier of the Netherlands and that all that the military authority of that Power had asked was that he be returned to his unit. We do not think that this court is bound to require formal proof that a soldier deserting or being absent without leave from his unit in time of war is guilty of an offence against the military law of his country. It would, indeed, be the height of artificiality to require such proof. The whole purpose of the Allied Forces Act, 1940, is to enable military courts of foreign allied Powers, whose troops are in this country, to deal with their soldier nationals for disciplinary purposes. The Act is dealing with military courts, offences and punishments. A foreign military court is empowered to sit and act in this country, and the provisions of the Army Act and the assistance of English courts and procedure are made available to assist them in exercising the jurisdiction thus conferred. Thus, we have the consideration of a crime and a charge preferred before a court exercising criminal jurisdiction, the English court in effect commits the accused person for trial before the foreign court martial, which is empowered to act in this country, and that court will hear and determine the charge.

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So the requirements as to its being a criminal cause or matter laid down by Lord Cave in *In re Clifford and O'Sullivan* (1) are amply fulfilled. It was laid down by Lord Esher in *Ex parte Alice Woodhall* (2) that the words "criminal "cause or matter" should receive the widest possible interpretation, and we have no doubt that the order of the Divisional Court on the application for a writ of habeas corpus in the circumstances was made in a criminal cause or matter, and, consequently, no appeal lies to this court from that decision.

Appeal dismissed.

Solicitor for Home Secretary: *Treasury Solicitor.*

Solicitors for applicant: *Gisborne & Co.*

Solicitors for Minister of Defence: *Stephenson, Harwood & Tatham.*

(1) [1921] 2 A. C. 570, 580. (2) 20 Q. B. D. 832, 835.

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SPOTTISWOODE, BALLANTYNE AND COMPANY, LIMITED *v.* DOREEN APPLIANCES, LIMITED.

Contract—Agreement to grant lease—Agreement subject to references being satisfactory and to the terms of a formal agreement to be prepared by lessor's solicitors—Agreement prepared by solicitors—Acceptance of terms by lessees—Refusal by lessors to grant lease—Claim for possession—Counterclaim for specific performance of agreement.

The plaintiffs, who were owners of a lease of premises, by a letter written by their agents, agreed to let the premises to the defendants "subject in the usual way to your references being "satisfactory, and to the terms of a formal agreement to be "prepared by their [the plaintiffs'] solicitors." They also said that, if the references were approved, and the defendants paid a quarter's rent in advance, they would do certain work to the premises and would allow the defendants to enter into possession, provided that the defendants gave an undertaking to vacate the premises if no agreement was entered into. The defendants paid the quarter's rent in advance and entered into possession of the premises. The plaintiffs' solicitors drew up a draft lease, which was sent to the defendants, who agreed the terms with the plaintiffs' agents. A few days later the plaintiffs refused to proceed with the agreement to let the premises to the defendants and called on them to remove their machinery and to vacate the

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Reported by F. R. R. Burford, Barrister-at-Law.

premises. As the defendants refused to do so, the plaintiffs brought an action to recover possession, and the defendants counterclaimed for specific performance of the agreement by the plaintiffs to give a lease of the premises to them :—

Held, that the letter of the plaintiffs' agents did not serve to complete a binding contract, and that the true meaning of the words "subject to the terms of a formal agreement to be prepared" was that no contract was to exist between the parties unless and until a formal agreement had been entered into.

Decision of Atkinson J. [1942] 1 K. B. 251 reversed.

APPEAL from decision of Atkinson J. (1).

In July, 1941, the parties had been in negotiation with regard to the granting of a lease. On August 1, 1941, the defendants wrote making an offer and on the same day Messrs. Farebrother, Ellis & Co., the agents for the plaintiffs, wrote the following letter : "We are obliged by your letter "of to-day's date, making an offer to take the first and second "floors as inspected. We have submitted this to our clients "who are prepared to proceed with the letting, subject in "the usual way to your references being satisfactory and to "the terms of a formal agreement to be prepared by their "solicitors. We have to-day applied for the references, and "as soon as these are approved by our clients we will ask you "to let us have your cheque for one quarter's rent in advance, "namely, 68*l*. 15*s*., when our clients will give instructions for "the necessary work to be put in hand, and will be willing "for you to enter into possession, provided the rent is paid "from the date you take it over and you give an undertaking "to vacate when called upon, if no agreement is entered into." The defendants paid the rent in advance and entered into possession. On August 13, the plaintiffs' solicitors sent to the defendants a draft of the agreement, but, after certain discussions had taken place, on August 28 the plaintiffs wrote saying that they were not willing to proceed with the agreement and requiring the defendants to vacate the premises. The defendants refused to do so and the plaintiffs brought an action claiming to recover possession of the premises. The defendants counterclaimed for specific performance of an agreement contained in the letter of August 1, 1941, to grant them a lease of the premises. Atkinson J. dismissed the action, and made an order for specific performance on the counterclaim. The plaintiffs appealed.

(1) [1942] 1 K. B. 251.

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Lord Greene M.R.

Vaisey K.C. and *Lightman* for the plaintiffs. The defendants are not entitled to succeed on their counterclaim. On the true construction of the letter of August 1, 1941, the plaintiffs did not enter into a binding agreement. Many of the authorities dealt with by Atkinson J. are not relevant to the present case. The relevant authorities, *Raingold* v. *Bromley* (1) and *C. H. C. Berry, Ld.* v. *Brighton and Sussex Building Society* (2), are in favour of the plaintiffs. [They were stopped.]

Solley for the defendants. There is a distinction between phrases such as "subject to contract" and "subject to the "terms of a formal agreement to be prepared." The phrase "subject to contract" means that a binding contract does not come into existence until the contract is signed and exchanged. No such result follows where the phrase used is that in the letter of August 1. *Lockett* v. *Norman-Wright* (3) contains passages which are helpful to the defendants' case: see the argument of *Galbraith K.C.* (4). *Raingold* v. *Bromley* (1) can be distinguished on the facts.

Lord Greene M.R. The question for our determination is very short, and one, which, to my mind, with all respect to the learned judge, has a clear answer. It turns on the meaning of the letter of August 1, 1941, the crucial words being those which refer to a formal agreement being entered into. It is said by the defendants that the words in the letter mean nothing more than that, as soon as the solicitors for the plaintiffs had put into formal shape the matters on which the parties were in agreement, a binding, unconditional contract would come into existence, notwithstanding that the formal document in which those terms were to be set out was never signed and exchanged by the parties. On the other hand, the plaintiffs contend that the language means that no contract was to exist between the parties unless and until a formal agreement had been entered into. In my opinion, the second construction is unquestionably right. I am quite unable to construe the words "subject to the terms of a formal "agreement to be prepared by their solicitors" as meaning that the "formal agreement" referred to is *not* one which is to be executed by the parties in the usual way. An unexecuted document would not be a formal agreement. If any doubt could remain as to the true construction of the phrase, the matter is entirely settled, in my judgment, by the words referring to the undertaking to vacate when called on if no agreement is entered into. It is manifest that the agreement there referred to is the same as the formal agreement mentioned in the earlier passage, and how a formal agreement is to be entered into unless it is executed and exchanged in the usual way I am unable to discover. The real fact of the matter is that the language used here is equivalent to the common and more concise phrase "subject to contract" and it is well settled that that phrase makes it clear that the intention of the parties is that neither of them is to be contractually bound until a contract is signed in the usual way.

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(1) [1931] 2 Ch. 307.
(2) [1939] 3 All E. R. 217.
(3) [1925] Ch. 56.
(4) Ibid. 60.

That really disposes of the whole case, but I must say a word with regard to the manner in which the learned judge dealt with a large number of authorities which he reviewed at length. It is with no disrespect to him that I venture to suggest that the examination of those cases has prevented him from seeing clearly the true nature of the question before him, and, no doubt inspired by a desire to protect the defendants from treatment which he may have thought was high-handed, he endeavoured to draw fine distinctions between the language used in the various authorities, and the present case. I do not propose to follow him by examining those authorities at length, but I am going shortly to refer to three of them. The relevant words in *Lockett* v. *Norman-Wright* (1) were: "Subject to suitable agreements being arranged "between your solicitors and mine." The solicitors had come to an agreement between themselves. The draft was settled. The parties were ready to complete, and then the defendant refused to go on. Tomlin J. said (2): "The "question is one primarily of construction. Is there any real "distinction between the language used here and such phrases "as 'subject to a formal contract', 'subject to contract', "'subject to a proper contract to be prepared by the vendor's "'solicitor'? The plaintiff urges that the phrase here means: "'I agree to take a lease at the rent and for the term mentioned "'in the letter and upon such other terms as the solicitors of "'the parties may settle between themselves'; and that "when once the draft lease had been approved by the "solicitors the condition was fulfilled and there was an "absolute contract. I do not think I can place any such

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(1) [1925] Ch. 56.
(2) Ibid. 61.

"construction upon the language. I think the natural meaning "of the language is that the execution of a suitable agreement "or suitable agreements in a form approved by the solicitors "on both sides is a condition of any concluded bargain. The "construction suggested on behalf of the plaintiff is artificial, "and I do not think that the court should place an artificial "meaning on the language employed merely in order "to make a contract of that which would otherwise be no "contract."

In *Raingold* v. *Bromley* (1), a decision of Lawrence L.J. sitting as an additional judge of the Chancery Division, the phrase was: "subject to the terms of a lease" and an exactly similar argument was put forward. The learned lord justice said (2): "The matter, however, does not rest there, for in "my opinion the true construction of the expression 'subject "'to the terms of a lease' is that contended for on behalf of "the defendant. The expression, I think, means 'subject to "'the terms to be contained in a lease executed by the lessor,' "and, therefore, implies that a lease has to come into existence "and has to be executed by the lessor before any binding "agreement is reached. The expression 'subject to the terms "'of a lease' is, in my opinion, at least as strong as 'subject "'to contract', and was inserted in the letter of December 9, "in order to keep the matter open until a lease had actually "been executed by the defendant." In *C. H. C. Berry, Ld.* v. *Brighton and Sussex Building Society* (3) the words were: "subject to a lease to be drawn up by our clients' solicitors." Farwell J. said (4): "Counsel for the plaintiffs says that that "means, as a matter of construction, that, the moment the "solicitors have agreed as to the form of the lease, the condition "is fulfilled, and the contract is a binding contract, which his "clients are entitled to enforce. On the other hand, it is "said that this in effect is nothing more than a contract to "enter into a contract, which, the authorities have established "now quite plainly, is not a binding contract at all." And then he refers to the judgment of Lawrence L.J. in *Raingold* v. *Bromley* (1) with the reasoning of which he says he entirely agrees, and after quoting the passage which I have read he proceeds: "In my judgment, the reasoning of that passage "in the judgment is conclusive in this case. It is said on behalf "of the plaintiffs, however, that in that case the condition

(1) [1931] 2 Ch. 307.
(2) Ibid. 316.
(3) [1939] 3 All E. R. 217.
(4) Ibid. 219.

"was 'subject to the terms of a lease,' and that those words "differ from the words which I have before me—'subject "'to . . . . a lease to be drawn up by our clients' solicitors'— "and that that is different, in that it imports into this letter "a term that this is to be a binding contract, subject to a "condition, which condition is fulfilled as soon as the solicitors "on each side agree as to the terms of the lease. In my "judgment that is not a true construction of this letter."

It seems to me that the learned judges who decided those cases put a manifestly correct construction on the language before them, and I am quite unable to draw between that language and the language which we have here any such fine distinctions as Atkinson J. found it possible to draw. Further, as I have said, we have in this case the additional phrase: "if no agreement is entered into." The appeal must be allowed, with costs, and judgment entered for the plaintiffs for possession and mesne profits, the counterclaim being dismissed.

MACKINNON L.J. I agree.

GODDARD L.J. I agree with the judgment of the Master of the Rolls. I would draw attention to this passage from the judgment of Bankes L.J. in *Keppel* v. *Wheeler* (1): "I "pause here to state plainly what is now well established, "that where a person accepts an offer subject to contract, it "means that the matter remains in negotiation until a formal "contract is settled and the formal contracts are exchanged." This appeal must be allowed. Were our decision otherwise, it would interfere with a line of authorities which has stood for a number of years.

Appeal allowed.

Solicitors for plaintiffs: *Nash, Field & Co.*
Solicitors for defendants: *Oscar Mason & Co.*

(1) [1927] 1 K. B. 577, 584.

OODMAN [1950] 1 K. B. 267

Distinguished. CUNLIFFE *v.* GOODMAN. [1950] 1 All E.R. 720.

Distinguished. JONES *v.* HERXHEIMER. [1950] 1 All E.R. 323.

Considered. CUNLIFFE *v.* GOODMAN [1950] 2 K. B. 237

Explained. JONES *v.* HERXHEIMER [1950] 2 K. B. 106

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Mar. 2, 3, 16.

SALISBURY (MARQUESS) AND ANOTHER *v.* GILMORE AND ANOTHER.

Landlord and tenant—Lease—Repairs—Covenant to leave premises in repair—Tenant: application for renewal of lease—Tenant informed of landlords' intention to pull down premises—Intention abandoned after the expiration of the tenancy—Damages claimed for breach of covenant to leave in repair—Liability of tenant—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18, *sub-s.* 1.

In 1926 the first plaintiff demised to the first defendant, G., premises for a term of fourteen years from September 29, 1925, by a lease which contained a tenant's covenant to leave the premises in repair at the expiration of the term. The second defendant, M., was the assignee of the term. In 1937 M. asked for a renewal of the lease but was informed that the plaintiffs (who had become the landlords in 1936) intended to pull down the premises at the expiration of the lease. On September 29, 1939, M. vacated the premises and left them out of repair, being still under the impression that the premises were being pulled down. It was not till he received a letter dated December 5, 1939, from the plaintiffs' agents claiming damages for breach of covenant that he became aware that the scheme for forthwith pulling down and rebuilding the premises had been abandoned.

In an action by the plaintiffs for damages for breach of covenant M. relied on s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, which provides: " . . . . no damage [sic] shall be recovered for " a breach of any such covenant or agreement to leave or put " premises in repair at the termination of a lease, if it is shown " that the premises, in whatever state of repair they might be, " would at or shortly after the termination of the tenancy have " been or be pulled down . . . ." :—

Held (reversing the decision of Hilbery J.) (1.) that no restriction on building came into operation at the outbreak of the war or until October 7, 1940, and that the evidence showed that the plaintiffs had not abandoned their intention to pull down the premises until a date after the termination of the tenancy.

(2.) That the material part of s. 18, sub-s. 1, of the Act of 1927, was capable of construction without transposing any of the words, and as M. could show that at the moment when the covenant to leave the premises in repair fell to be performed the building was going to be pulled down at or shortly after the termination of the tenancy, he was entitled to the relief given by the sub-section.

Per MacKinnon L.J. (1.) There was no evidence that the value of the reversion on the lease was diminished by the failure to deliver up in repair and on this ground alone only nominal damages would be recoverable by the plaintiffs. (2.) Even nominal damages were not recoverable because no claim for breach of covenant lay having regard to ss. 5 and 18 of the Act of 1927, to the refusal to grant a renewal of the lease in 1937 on the ground that the premises were being pulled down at the termination of the lease and to the failure to communicate any change of intention to M. until over two months after the termination of the lease. As by the intimation that the premises were to be pulled down at the termination of the lease M. had been deprived of the right to obtain from the court a renewal of the lease under s. 5, sub-s. 3 (*b*) (ii.), of the Act, the principle enunciated by Lord Bowen in *Birmingham and District Land Co.* v. *London and North Western Ry. Co.* (1888) 40 Ch. D. 268, 286, applied, and afforded M. a defence to the claim for damages. *Jorden* v. *Money* (1854) 5 H. L. C. 185 was distinguishable.

APPEAL from Hilbery J.

By a lease dated March 23, 1926, the first plaintiff, the Marquess of Salisbury, let to the first defendant, Mr. Gilmore, the shop and premises being No. 59 New Bond Street, London (consisting of a shop with three floors above it), for the term of fourteen years from September 29, 1925. The lease contained the usual repairing covenants and a covenant at the end of the term to deliver up the premises in good repair. In 1927, the first defendant assigned to the second defendant, one Marcel, the said premises for the balance of the term of years subject to the rent and covenants contained in the lease. In December, 1936, the first plaintiff sold the reversion expectant upon the termination of the term to the second plaintiffs, the Gascoigne Cecil Estates Co., Ld., but no conveyance to this company was ever executed.

In May, 1937, the second defendant (hereinafter referred to as the defendant) wrote to ask for a renewal of the lease, but in November, 1937, the plaintiffs' agents wrote to the defendant saying that it was intended to demolish 58 and 59 New Bond Street when they both came to hand in September, 1939, and to erect a new building.

Early in 1939 the plaintiffs' agents took certain steps preliminary to the pulling down and reconstruction then in contemplation by obtaining from the London County Council the necessary permission for the proposed work and also the approval of the City Corporation. The scheme had then been extended to include a third building, 57 New Bond Street. War broke out on September 3, 1939, and on the termination of the lease on September 29, 1939, the defendant vacated No. 59 New Bond Street, without performing the covenant to leave the premises in repair. On September 26, 1939, the plaintiffs' agents wrote to their solicitors pointing out that the

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redevelopment programme had been completely upset by the war and said that, as far as they could see, it would not be practicable to start building during the war, and continued: "In any case it seems inadvisable to contemplate erecting a "new building while the risk of war damage is still present." They suggested approaching tenants to see if it was possible to arrange for their continued occupation on quarterly tenancies and concluded by saying that meantime they could proceed with preliminary work in connection with rebuilding. On October 6, 1939, the plaintiffs' solicitors, acting on instructions contained in a letter to them dated October 5, 1939, wrote directing the agents to incur no further preliminary expenses. The abandonment of the pulling down of the premises was first communicated to the defendant when the agents wrote on December 5, 1939, claiming from the defendant damages for breach of covenant and enclosed a schedule of dilapidations. The letter contained the following passage: "The future of "the premises is somewhat uncertain, and it may be that "after the war they will be pulled down and rebuilt. We are "instructed, therefore, to request you to pay to our clients "the amount of damages to be agreed, but should the premises "be pulled down within a reasonable time, or any alteration "be made which would render valueless any of the works "contained in the schedule if carried out, our clients will "refund to you the whole or a proportion of the sum in question "as provided by s. 18 of the Landlord and Tenant Act, 1927."

The defendant having declined to make any payment in respect of the breach of the covenant, the present proceedings were brought by the plaintiffs for damages. Originally, damages were claimed for breach of both of the repairing covenants and the covenant to leave the premises in repair, but the only evidence given at the hearing was in regard to breach of the last named covenant.

Hilbery J. held that on the outbreak of war on September 3, 1939, twenty-six days before the expiration of the lease of 59 New Bond Street, the proposed scheme of rebuilding became impossible and that in these circumstances the defendant could not rely as a defence to the action on the provision in s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, that ". . . . no damage shall be recovered for a breach "of any covenant to leave or put premises in repair at the "termination of a lease, if it is shown that the premises, in "whatever state of repair they might be, would at or shortly "after termination of the tenancy have been or be pulled "down . . . ." The words "would at or shortly after the "termination of the tenancy have been or be pulled down" were ungrammatical and inappropriate, and to give an intelligible meaning to them, the word "would" must be treated as accidentally misplaced so that the concluding words would read "have been or would be pulled down." It followed that, as the defendant had failed to show that the premises had been pulled down or that they would be pulled down shortly after the expiration of his tenancy, the plea based on the sub-section failed. And he awarded damages of 371*l.* on the ground that the true measure of the damages was the cost of the repairs. The defendant appealed.

A. T. Denning K.C. and *D. Weitzman* for the defendant. This appeal turns in the main on the construction of s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927 (1). The measure of damages for breach of a covenant to leave premises in good repair used to be fixed by law at the cost of making the repairs even though the premises were being pulled down. Sect. 18, sub-s. 1, of the Act of 1927, has altered this and damages are the amount (if any) by which the value of the reversion in the premises is diminished by the breach of covenant. Here there is evidence that owing to their age and deterioration the premises would on the falling in of the lease only have their site value. It follows that Hilbery J. was wrong to give damages fixed by reference to the cost of the repairs. So far that leaves out of account the second part of sub-s. 1. When a landlord represents that he is going to pull down the premises at the termination of the lease, and only changes his mind after the termination of the lease, he cannot recover damages for breach of the covenant. Further, the tenant by being told that the premises were going to be pulled down is deprived of the right to obtain a renewal of the lease from the court. Sect. 5, sub-s. 1, gives a tenant a right to claim a new lease of premises when he shows that the sum he would receive under s. 4, sub-s. 1, by way of compensation for loss of goodwill would not be sufficient compensation; then by sub-s. 3 the landlord can refuse the renewal of the lease on the ground that he is intending to pull down the premises at the termination of the lease and in such a case the tenant cannot successfully apply to the court for a renewal of the lease having regard to s. 5, sub-s. 3 (*b*) (ii.). Here, therefore, the announced intentions of the plaintiffs to pull down affected the rights of the defendant. Moreover, in view of this, the defendant did not press his sub-tenants to keep their part of the premises in repair as he thought it useless for the same reason that he did not himself put the premises in repair at the end of the lease.

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(1) Landlord and Tenant Act, 1927, s. 18, sub-s. 1: "Damages "for a breach of covenant or "agreement to keep or put "premises in repair during the "currency of a lease, or to leave "or put premises in repair at the "termination of a lease, whether "such covenant or agreement is "expressed or implied, and "whether general or specific, "shall in no case exceed the "amount (if any) by which the "value of the reversion (whether "immediate or not) in the "premises is diminished owing "to the breach of such covenant "or agreement as aforesaid; and "in particular no damage [sic] "shall be recovered for a breach "of any such covenant or agreement to leave or put premises "in repair at the termination of "a lease, if it is shown that the "premises in whatever state of "repair they might be, would "at or shortly after the termination of the tenancy have been "or be pulled down or such "structural alterations made "therein as would render valueless the repairs covered by the "covenant or agreement."

Hilbery J. was wrong in thinking that it became impossible for the plaintiffs to pull down the premises and rebuild as soon as the war started. No limitation on building was imposed till a good deal later and the plaintiffs only abandoned the pulling down of the premises on October 5, 1939, after the termination of lease, and the first news the defendant had of this was on December 5, 1939, when he was sent a schedule of dilapidations with a claim for payment of the cost of repair. The case is therefore directly covered by the latter part of s. 18, sub-s. 1, and Hilbery J. took a wrong view of the construction of that part of the sub-section. There is no justification for altering the position of "would" in the way he suggested and the words "would have been" cover this case. Hilbery J. was wrong, too, in thinking that the position had to be taken at the date of the trial. The test must be whether at the date of the termination of the lease the intention to pull down the premises stood and that it clearly did.

Lastly, although this is not a strict case of estoppel (*Jorden* v. *Money* (1)), the equitable principle applies, which was laid down in *Birmingham & District Land Co.* v. *London & North Western Ry. Co.* (2). That principle is that if a person with

(1) (1854) 5 H. L. C. 185. (2) (1888) 40 Ch. D. 268, 285.

a contractual right against another induces that other to believe that it will not be enforced, he will not be allowed to enforce the right without at any rate putting that other party into the position he was in before. [They also referred to *Panoutsos* v. *Raymond Hadley Corporation of New York* (1), *Traill* v. *Baring* (2), *With* v. *O'Flanagan* (3)].

The only difficulty is created by *Jorden* v. *Money* (4), where a distinction was made in a case where there was only a statement of intention. The doctrine there laid down does not apply here (*a*) because a landlord's expression of intention does suffice under s. 18, sub-s. 1, of the Act of 1927, to alter the liability of a tenant under his covenant to leave the leasehold premises in repair; and (*b*) because *Hughes* v. *Metropolitan Ry. Co.* (5), which is also a decision of the House of Lords, applies here and shows that the plaintiffs had in effect waived the right to damages for breach of the covenant to leave in repair.

Havers K.C. and *C. E. Rochford* for the plaintiffs. If the view be accepted that under the latter part of s. 18, sub-s. 1, of the Act of 1927, the crucial date is the date when the lease expired, there is still a finding by Hilbery J. that at that date it had already become impossible to pull down and rebuild the premises. It is not suggested that this was under any Defence Regulation but that war conditions had rendered rebuilding impossible. Therefore, if the construction of this part of s. 18, sub-s. 1, without transposing any words, be accepted, there is still a good reason why the sub-section does not apply.

Again, reliance has been placed on *Hughes* v. *Metropolitan Ry. Co.* (5), but the fact remains that for a great many years the view that the equitable doctrine of estoppel does not apply in the case of a mere statement of intention has prevailed. That was decided in *Jorden* v. *Money* (4), which has been applied in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (6) and the distinction between representations of intention and representations of fact approved: see also *Chadwick* v. *Manning* (7). The highest it can be put against the plaintiffs here is that they promised to pull down the premises at the end of the term and, if so, it was a promise without consideration. *Hughes* v. *Metropolitan Ry. Co.* (5)

(1) [1917] 2 K. B. 473.
(2) (1864) 4 De G. J. & S. 318, 329.
(3) [1936] Ch. 575.
(4) 5 H. L. C. 185.
(5) (1877) 2 App. Cas. 439.
(6) (1873) L. R. 6 H. L. 352, 360.
(7) [1896] A. C. 231, 238.

was decided on very special facts. *Birmingham & District Land Co.* v. *London & North Western Ry. Co.* (1) is almost identical with *Hughes* v. *Metropolitan Ry. Co.* (2).

In regard to the question of damages, the whole position had been altered by the decision not to pull down the premises and in those circumstances the view was taken that the best chance of letting the premises would be if they were put in repair. In these circumstances, therefore, the failure to repair had reduced the value of the reversion by the cost of carrying out the repairs. That is the view Hilbery J. took of the evidence before him and it is contended that it was correct.

A. T. Denning K.C. replied.

Cur. adv. vult.

1942. Mar. 16. The following judgments were read.

LORD GREENE M.R. Hilbery J. took the view that immediately upon the outbreak of war the project of pulling down and rebuilding was at an end. I am unable to agree with him. Chesterton & Sons had no power to come to any decision in the matter. There was at the time no regulation in force prohibiting such work although its execution might have been difficult. Hilbery J. appears to have thought that there was such a prohibition against building at a cost of more than 500*l.* and one of the witnesses so stated. This is an error. So far as I have been able to discover (and I am supported by counsel for the plaintiffs) no restriction was in existence before the making of St. R. & O., 1940, No. 1678, which came into force on October 7, 1940, a year later than the relevant date. I come, therefore, to the conclusion that on September 29, 1939, no change had taken place in the intention of the plaintiffs to pull down the building.

It must now be considered whether in the circumstances stated the second branch of s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, frees the defendant from liability to pay damages for breach of the covenant to deliver up in repair. That branch is worded in a way which at first sight appears crabbed and ungrammatical. Hilbery J. took the view that no coherent meaning could be given to it without transposing certain of the words. I do not share his difficulty.

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(1) 40 Ch. D. 268.

(2) 2 App. Cas. 439.

I find no necessity and accordingly no justification for rewriting the relevant words in the way in which he has rewritten them. But in order to make the matter clear, I must examine the actual language of the relevant part of the section. Its broad purpose is not open to doubt. Before it was enacted, a lessor could recover damages from his tenant for breach of a covenant to deliver up in repair notwithstanding that the buildings were going to be pulled down or structurally altered in such a way as to make it useless to perform the covenant. The enforcement of the covenant in such circumstances was regarded as an unjust enrichment of the lessor and the legislature in s. 18, sub-s. 1, set itself to remove the injustice. The relevant words are as follows: "and in particular no "damage shall be recovered for a breach of any such covenant "or agreement to leave or put premises in repair at the "termination of a lease, if it is shown that the premises, in "whatever state of repair they might be, would at or shortly "after the termination of the tenancy have been or be pulled "down, or such structural alterations made therein as would "render valueless the repairs covered by the covenant or "agreement." The words which Hilbery J. found incapable of construction as they stand are the words "if it is shown "that the premises . . . . would at or shortly after the termina-"tion of the tenancy have been or be pulled down." It may be asked why the words "would have been or be" were used rather than words referring to the intention of the lessor. The answer is that a building might be destined for demolition for some reason other than the intention of the lessor, for example—under a demolition order or a compulsory purchase under a street widening scheme. It was therefore necessary to use words of general import expressing the future fate of the building whatever the cause of that fate might be. The draftsman might have used the expression "were going to be "pulled down at or shortly after the termination of the tenancy," but he preferred to express futurity in a different but grammatically legitimate way. Two more points must be borne in mind in considering the structure of the sentence. The first is that the point of time in relation to which the fate of the building is to be considered is that at which the covenant to deliver up falls to be performed, namely, the termination of the lease. The other is that the date at which the tenant is to prove the intended fate of the building is the date at which the action claiming damages for breach of the covenant is heard which is necessarily subsequent to the termination of the lease. These considerations appear to me to explain the construction of the sentence. The words "would have been" are, I think, grammatically correct to express in a statement in oratio obliqua ("if it is shown that") made at a subsequent date (the date of trial) in relation to what at an earlier date (the termination of the lease) was a future event which at that date was in contemplation. The moment before the termination of the tenancy it would be correct for the tenant to say "I say that this house will be pulled down at the ter-"mination of the tenancy." If at a date later than the termination of the tenancy he wishes to describe the future fate of the house regarded from the same moment of time he would say, if he spoke grammatically, "I say that this house "would have been pulled down at the termination of the "tenancy." What else as a matter of English could he say? He could not say "I say that the house will be pulled down "at the termination of the tenancy" since the termination of the tenancy has already taken place, nor could he say "I say that this house would be pulled down at the ter-"mination of the tenancy." He might have said, if the sub-section had been so framed, "I say that this house was "going to be pulled down at the termination of the tenancy" and this seems to me to be an accurate paraphrase of the language used. It is, I think, incorrect to say that the words "would have" make it necessary to imply a conditional sentence such as "if it had not been for the landlord's action "in claiming damages" or "if it had not been for some "extraneous cause." No such implication is in my view necessary. The remaining words "be pulled down" must, I think, be linked up to the words "would" and "shortly "after the termination of the tenancy" so that this limb of the sub-section will run "if it is shown that the premises would "shortly after the termination of the tenancy be pulled down." Here the draftsman has, I think, to some extent sacrificed grammar to conciseness. But his difficulty was a real one as he had to deal with an event, namely, pulling down shortly after the termination of the tenancy which at the relevant time, namely, the hearing of the action might be past or future and he has apparently used the words "would be" to meet this difficulty. However this may be, I am of opinion that if the tenant can show at the trial that at the moment when the covenant fell to be performed the building was one which was going to be pulled down at or shortly after the termination of the tenancy he is entitled to the relief which the sub-section gives.

The question then arises, what is the test by which the fate of the building as at the relevant date—namely, the date at which the covenant ought to be performed—is to be ascertained? I have already pointed out that a building may be destined for demolition either because the landlord has so determined or because some extraneous authority has decided to exercise its powers in that behalf. I have also pointed out that the crucial date is the date of the termination of the lease. Once that date has passed, the tenant is no longer in a position to fulfil his covenant: and if it is shown that before that date arrives the landlord has decided to pull down the building and that this intention is still existing at that date, the requirements of the sub-section are in my opinion satisfied. Hilbery J. took a different view of the meaning of the sub-section. My grounds for differing from him sufficiently appear and it is no disrespect on my part if I do not examine his reasons in detail. Mr. Havers on behalf of the plaintiffs felt himself unable to argue in favour of a construction different from that which I have set out above. He admitted that if the intention of the plaintiffs to pull down the building still prevailed at the termination of the lease, the sub-section would apply and that a change of intention at a later date would not assist him. His point was that the intention must on the facts be treated as having been abandoned at the outbreak of the war or, at any rate, before September 29. I have given my reasons for rejecting this view.

This is sufficient to dispose of the appeal. It is accordingly unnecessary for me to discuss the two other matters raised on behalf of the defendant. The first was that even if the intention of the plaintiffs had in fact been abandoned before September 29, the plaintiffs were precluded from so asserting since the statement which they had made as to the fate of the building in the letter of November 5, 1937, was left uncorrected until long after the termination of the lease and the defendant in reliance on that statement (as he said in evidence) refrained from doing the repairs. The other matter related to the damages awarded. It is said that if the latter part of sub-s. 1 of s. 18 does not apply, the damages recoverable under the earlier part of the sub-section are to be limited to the diminution in the value of the reversion and that no

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such diminution is shown by the evidence. I express no opinion on either of these questions.

MACKINNON L.J. I agree that this appeal should be allowed. The plaintiffs sued the defendant for damages for breach of covenants in his lease (*a*) to keep the premises in repair throughout the term, and (*b*) to deliver up the premises at the end of the term in a state of repair. The learned judge gave the plaintiffs 371*l.* damages. That was in effect the cost of doing repairs found to be necessary by the plaintiffs' surveyors upon a survey made after the end of the term.

There is a simple ground on which I think the appeal succeeds. It is provided by s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, that damages for a breach of covenant to keep or put premises into repair during the currency of a lease, or to leave in repair at the end of a tenancy, shall in no case exceed the amount by which the value of the reversion is diminished by such breach. In my opinion there was no evidence at the trial of any diminution in the value of the reversion by reason of any breach of covenant to repair, or yield up in repair, by the defendant. There was in fact no evidence for the plaintiffs of any breach of (*a*) the covenant to keep in repair during the term. No complaint of any such breach had ever been made. The plaintiffs' surveyors had inspected the property in July, 1937, but they gave no evidence of finding any breach then. The only evidence as to breach was under (*b*) the covenant to deliver up in repair, upon a survey and schedule of dilapidations made after such delivery up. As to the effect of this breach on the value of the reversion the first surveyor could only say that the depreciation was "the cost of doing the repairs," but on cross-examination said "I am not in a position to answer " (as to the depreciation) "because it is a question of the value of the premises and as a "surveyor assessing dilapidations I was only concerned with the "cost of making the repairs." The other surveyor, on being asked what was the depreciation, answered: "I think the "cost of the work is the only possible criterion." But he also said, in cross-examination, that the only real value of the premises was the site value, and "you would get as much "for the site as for the site with the building on it." On this I am clear that the learned judge was wrong in that passage of his judgment in which he says: "I accept the evidence "of the plaintiffs' witnesses . . . . I am satisfied that the cost "of making good the want of repair is as nearly as it can be "assessed the same as the diminution in the value of the "reversion resulting from the breaches of covenant to yield "up in repair." There was no evidence of any diminution of value in the reversion, and the judgment, if given for the plaintiffs, should have been for nominal damages only.

But in my view there should not have been judgment for the plaintiffs even for nominal damages. Two other material provisions of the above cited Act of 1927 are these: (*a*) by s. 5 the tenant may, subject to certain conditions, apply for a new lease twelve months before the end of his term, and if it is refused, may apply to the tribunal for the grant of such new lease; and (*b*) "no damage shall be recovered for a "breach of any covenant to leave or put premises in repair "at the termination of a lease, if it is shown that the premises, "in whatever state of repair they might be, would at *or* shortly "after the term of the tenancy have been *or* be pulled down," (s. 18, sub-s. 1). The learned judge thought that this passage was "ungrammatical and inappropriate" and that "either "something is omitted or the words have by inadvertence been "transposed." And he thought the passage should be amended so as to read: "if it is shown that the premises . . . . at or "shortly after the termination of the tenancy have been or "would be pulled down." I do not agree with this criticism. The sentence is difficult to construe, because of its succinct condensation. As was pointed out by the Master of the Rolls during the argument, the draftsman had to provide for the event of demolition from any cause—for example by proceedings taken for a street widening, as well as by the estate policy of the landlord. I think the succinct phrase in the section deals with two alternatives which are separated by the two "ors" which I italicized above. If the sentence were written out more at length, it could read: "if it be "shown that the premises . . . . would at the termination of "the tenancy have been pulled down, *or* would shortly after "the termination of the tenancy be pulled down."

The intention of the legislature is manifest. It is to prevent the recovery of damages for not delivering up in repair if the landlord is not going to relet them, but is going to demolish them, or is constrained to have them demolished. Such a claim for damages can only arise after the lease has expired. At the hearing the tenant might prove one of three things: (*a*) that the premises have been already demolished, in which

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case cadit quaestio; (*b*) that they remained in existence only because the landlord did not want him to prove (*a*) and that but for this they *would have been* demolished; (*c*) he might not be able to prove (*b*) because sufficient time had not elapsed, or because a street widening order had not yet become operative, but he could prove that they would shortly be demolished. I think the alternatives in the section are to provide for (*b*) and (*c*). It was obviously unnecessary to provide for (*a*).

In June, 1937, the defendant applied for a renewal of his lease in anticipation of its termination in September, 1939. The plaintiffs' agents (I feel sure without the knowledge of the first plaintiff) made him pay a preliminary fee of five guineas for a survey, and I feel no surprise at the defendant's chagrin thereat. On November 5, 1937, the surveyors wrote to the defendant that his lease could not be renewed as the plaintiffs intended to demolish this and the adjoining building and erect a new building on their site.

By s. 5 of the Act of 1927 the defendant, if he had a claim for goodwill under s. 4, but thought it would not compensate him, might take steps twelve months before the end of his lease to apply to the tribunal for a new lease. He consulted his solicitors but they advised him that, by reason of s. 5, sub-s. 3 (*b*) (ii.) any such application must fail, as the premises were going to be pulled down. Whether he could have made such a claim, by reason of s. 4, I do not know. It may not have been considered. Anyway, there was no evidence about it.

In any view the surveyor's letter of November 5, 1937, not only intimated that he could not have a new lease, it also impliedly intimated two further things—(*a*) it will be no use your applying to the tribunal for a new lease, having regard to s. 5, sub-s. 3 (*b*) (ii.), and (*b*) you need not, having regard to s. 18, fulfil your covenant to deliver up in repair, or, rather, you will not be liable for any damages if you do not fulfil it.

The intention of the plaintiffs to demolish the house in September, 1939, remained very active until the outbreak of war on September 3, 1939. The difficulty of doing so, and of rebuilding (though, as the Master of the Rolls has pointed out the legality of doing so remained unaffected for at least a year longer) was apparent. And on October 5, 1939, the plaintiffs intimated to their agents that they abandoned the

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scheme. But no intimation of any change from the intention conveyed to the defendant in the letter of November 5, 1937, was ever given to the defendant until after he had vacated the premises, or indeed until the present claim was presented to him by a letter from the estate agents of December 5, 1939. I confess I am not surprised that the plaintiffs' solicitors wrote to those agents on October 13, 1939: "As regards "dilapidations we assume that having regard to the provisions "of the Act of 1927 no claim can be made in this respect." If they had said "having regard to the provisions of the Act, and the communications you have made to the tenant, no claim can be made" they would exactly have anticipated what, in my view, should be the head note of the proper judgment in this case.

It was suggested that by reason of the letter of November, 1937, and having regard to the terms of the Act, the plaintiffs were estopped from denying that the house was to be pulled down in September, 1939. As there was no evidence that by fulfilling the requirements of s. 4 of the Act the defendant could have applied for a new lease under s. 5, and abstained from doing so because of the letter, I do not think such an estoppel is complete.

But in another aspect of the case, and the facts I have set out, it falls within the principle enunciated by Bowen L.J. in *Birmingham & District Land Co.* v. *London & North Western Ry. Co.* (1): "If persons who have contractual rights against "others induce by their conduct those against whom they "have such rights to believe that such rights either will not be "enforced or will be kept in suspense or abeyance . . . ., those "persons will not be allowed by a Court of Equity to enforce "the rights . . . . without at all events placing the parties in "the same position as they were before." The letter of November 5, 1937, uses the phrase: "It is the intention of "(the plaintiffs) to demolish the building." Because of this we were pressed for the plaintiffs with *Jorden* v. *Money* (2). In that case the voices of infallibility, by a narrow majority, held that though a misrepresentation of fact may bind a man, a mere falsified statement of his future intention does not. We were told by Mr. Denning that the Law Reform Committee has had the audacity to propose the legislative abolition of this refinement, but for us it remains binding. But the question must be what is the substance of the intimation by

(1) 40 Ch. D. 286.

(2) 5 H. L. C. 185.

the man concerned, not what is the form or language of it. A statement using the words "intend" or "intention" in form, may be, in substance, a representation of fact. If one says "I am growing old; I do not intend to live long," in form he states an intention, in substance he states a melancholy fact. In substance the communication of November, 1937, stated facts. "This house is so old and out of date that "any sensible landlord would rebuild it at the end of the "term," or, more succinctly, "This house is ripe for re-erection, "it is doomed to demolition in September, 1939." That being the substance of the statement to the defendant, I do not think the rule in *Jorden* v. *Money* (1) avails to prevent him relying on the principle stated by Bowen L.J., merely because the words of the letter happen to use the word "intention."

GODDARD L.J. In my opinion the true construction of the material passage in s. 18 depends on the fact that the word "would" applies both to the words "have been" and to the word "be." "Would have been" refers to "at the termination "of the tenancy" and "would be" to "shortly after the "termination." I think it must have been in the draftsman's mind that where a tenant has to show either of these things, the premises will not have been pulled down at the time when he has to show them. If they have been, cadit quaestio. But if they are standing he can say "but for your claim or some "other reason either they would have been pulled down when "my tenancy ended, or would be shortly after." In any case the intention of the section is clear; if the premises are going to be demolished, whether by the landlord, a local authority or anyone else, the tenant is not to be liable for dilapidations. The section clearly deals with intention, and the question arises whether the tenant has to show an intention in somebody to demolish existing at the date of the trial, as Hilbery J. thought was necessary, or an intention existing at the time when the lease expired. In this court both counsel agreed that the latter was the correct view, and in my opinion this must be so; otherwise the landlord could give himself a cause of action after the termination of the lease which did not exist when it came to an end, and after, by informing the tenant of his intention, he had in effect told him he did not and could not require him to perform his covenant. The present case, therefore, becomes one of great simplicity, for the facts are beyond dispute, and it is unnecessary to consider many of the interesting matters that were discussed before us. On November 5, 1937, the defendant was informed in explicit terms that the plaintiffs intended to pull down the house at the end of the lease. Lord Salisbury gave evidence at the trial and did not attempt to say that he ever changed his mind before he got his solicitor's letter on October 5. His intention, therefore, subsisted when the lease came to an end on September 29. What conclusion he might have come to had the matter been presented to him earlier is immaterial. He never applied his mind to the question before October 5, and until that date his intention was unchanged, nor was there any enactment or regulation then in force which could have prevented the carrying out of the scheme. Accordingly the section relieved the defendant from the obligation of the covenant. I agree that the appeal should be allowed.

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(1) 5 H. L. C. 185.

Appeal allowed.

Solicitors: *Gale & Phelps; Nicholson, Freeland & Shepherd.*

H. C. G.

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Mar. 11, 12, 13, 26.

Insurance (motor)—Third-party insurance—Avoidance of by insurers—Notice to third party—Road Traffic Act, 1934 (24 & 25 *Geo.* 5, *c.* 50), *s.* 10, *sub-ss.* 1, 3, 5.

By s. 10, sub-s. 1, of the Road Traffic Act, 1934, a right is conferred on third parties to recover damages from an insurer under a motor car policy, notwithstanding the fact that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy. By sub-s. 3 no sum shall be payable by an insurer if, in an action commenced before, or within three months after, the commencement of the proceedings in which the third party obtains judgment, the insurer obtains a declaration that he is entitled to avoid the policy on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular, provided that the benefit of the declaration is not to avail the insurer as against a third party who obtains his judgment in proceedings commenced before the commencement of the insurer's action unless

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the insurer has, before or within seven days after the commencement of his own action, given notice to the third party " specifying " the non-disclosure or false representation on which he proposes to " rely." Sub-s. 5 defines " material " as meaning " of such a " nature as to influence the judgment of a prudent insurer in " determining whether he will take the risk, and, if so, at what " premium and on what conditions ":—

Held, that if, in an action by an insurer to avoid his liability under a policy of motor car insurance issued by him on the grounds of misrepresentation and non-disclosure he discovers a fresh ground of misrepresentation or non-disclosure and obtains leave to amend his statement of claim, such leave to amend will not avail him as against a third party, unless he has given notice to the third party specifying the fresh non-disclosure or false representation on which he proposes to rely within seven days after the commencement of his action.

Held, further, that in such an action the insurer must prove that the non-disclosure or misrepresentation is of such a character that the policy was obtained by it, and that, but for such non-disclosure or misrepresentation, no prudent insurer would have issued the policy.

Mutual Life Insurance Co. of New York v. *Ontario Metal Products Co., Ld.* [1925] A. C. 344 applied.

APPEAL from Atkinson J.

The plaintiffs, a firm of underwriters, claimed to avoid a policy of motor insurance issued by them to the first defendant, Morrison, in November, 1938. To obtain the policy, Morrison, in filling up a form issued by the plaintiffs, answered as indicated question (2.) : " State whether you have driven motor cars "regularly and continuously in the United Kingdom during "the past twelve months "—" Yes." " How long have you "driven motor cars ? "—" Three years." He answered " No " to question (8.) : " Have you been convicted of any offence "in connection with any motor vehicle ? " On September 30, 1939, the car, while being driven by the second defendant, Lauriston, with the consent of Morrison, caused the death of Aaron Rackley, the husband of the third defendant, Mrs. Rackley. On March 1, 1940, the plaintiffs issued the writ in this action, having, on February 28, served Mrs. Rackley with notice of the matters on which they intended to rely, and she was subsequently joined as a defendant. In their particulars they stated that : " The material facts "which the said Morrison failed to disclose were (*a*) that he "had not regularly or continuously driven a motor car during "the twelve months preceding November 23, 1938 ; (*b*) that "he had not driven motor cars for three years and was the "holder of only a provisional driving licence who, on being "given a driving test, had failed to pass such test." On August 29, 1940, Mrs. Rackley obtained judgment against Lauriston for 1800*l.* damages. In 1941 the plaintiffs discovered a further cause of complaint against Morrison, and in October, 1941, they were given leave to amend their statement of claim by adding a further ground of complaint, namely: " On July 11, 1938, at the sheriff court of Lanarkshire "at Hamilton, Scotland, the first named defendant was "convicted of contravening s. 15, sub-s. 1, of the Road Traffic "Act, 1930, and was thereupon sentenced to pay a fine of 10*l.* "or to suffer thirty days imprisonment and was further "thereupon disqualified from holding or obtaining any driving "licence for a period of twelve months from the said July 11, "1938, and his licence was endorsed accordingly." Mrs. Rackley on October 20, 1941, filed an amended defence in which she stated that the further grounds of complaint were not specified in the notice served on her by the plaintiffs under the provisions of s. 10, sub-s. 3, and that they could not now be relied on as against her. Atkinson J. held that the policy was not obtained from the plaintiffs by false representation or non-disclosure, and he upheld the plea of Mrs. Rackley in her amended defence. The plaintiffs appealed.

Beyfus K.C. and *Fox-Andrews* for the plaintiffs. The plaintiffs contend that they are entitled to avoid the policy issued by them to the defendant, Morrison, on the ground that it was obtained by non-disclosure of material facts and by misrepresentation, and that they gave Mrs. Rackley notice specifying the non-disclosure and misrepresentation in compliance with the proviso to s. 10, sub-s. 3, of the Road Traffic Act, 1934. The defendant, Morrison, gave untruthful answers on the form which he filled up to obtain his insurance policy. The plaintiffs gave due notice to Mrs. Rackley, and they were entitled to amend that original notice. When the notice was served they were unaware of the conviction and disqualification of Morrison. Fraudulent misrepresentation is always a ground for avoiding a contract: *William Pickersgill & Sons, Ld.* v. *London and Provincial Marine and General Insurance Co., Ld.* (1); *Aaron's Reefs, Ld.* v. *Twiss* (2). They also referred to *Merchants & Manufacturers Insurance Co., Ld.*

(1) [1912] 3 K. B. 614.

(2) [1896] A. C. 273.

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v. *Hunt* (1) and *Merchants & Manufacturers Insurance Co., Ld.* v. *Davies* (2).

Denning K.C. and *Hauser* for the defendants were not called on.

Cur. adv. vult.

1942. Mar. 26. The following judgments were read.

Lord Greene M.R. By s. 10 of the Road Traffic Act, 1934, provision is made for enabling third parties to recover from insurers the amount of any judgment obtained in respect of a liability covered by a policy under s. 36 of the Road Traffic Act, 1930. The scheme of the section so far as relevant is as follows. By sub-s. 1 the right so to recover from the insurers is conferred on third parties notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy. By sub-s. 3 the right of the insurer to avoid the policy is preserved, provided that, in an action commenced before or within three months after the commencement of the action in which the third party obtains judgment, he obtains a declaration that the policy was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular. If this sub-section had stopped there, the benefit conferred by sub-s. 1 on third parties would have been seriously curtailed, but a proviso is added for their protection by which the benefit of the declaration is not to avail the insurer as against a third party who obtains his judgment in proceedings commenced before the commencement of the insurer's action, unless the insurer has, before or within seven days after the commencement of his own action, given notice to the third party "specifying the non-disclosure or false representation "on which he proposes to rely," and the third party can then apply to be added as a party to the insurer's action. The object of this proviso clearly is to enable the third party to decide whether, in view of the allegations contained in the notice, it is worth his while to incur the expense of proceeding with his action and to allow him, as a person interested in disputing the insurer's claim, to be heard in opposition to it. Sub-s. 5 defines the word "material" as meaning "of such a nature "as to influence the judgment of a prudent insurer in

(1) [1941] 1 All E. R. 123.
(2) [1938] 1 K. B. 196.

"determining whether he will take the risk and, if so, at what "premium and on what conditions."

In the notice served under the proviso to sub-s. 3 the plaintiffs gave particulars of the non-disclosure and misrepresentation on the part of the policy holder, Morrison, on which they proposed to rely. Only two of these matters need be mentioned, namely, (1.) the affirmative answer on the proposal form to the question: "State whether you have "driven motor cars regularly and continuously in the United "Kingdom during the past twelve months"; and (2.) the non-disclosure of the fact that Morrison "was the holder of "only a provisional driving licence who on being given a test "had failed to pass such test." The statement of claim as delivered set out these matters and also other matters mentioned in the notice on which the plaintiffs do not now rely. At a later stage a further allegation of non-disclosure was added to the statement of claim by amendment, namely, non-disclosure by Morrison of the fact that he had been convicted of contravening s. 15, sub-s. 1, of the Road Traffic Act, 1930, and disqualified from holding or obtaining any driving licence for a period of twelve months. It is not open to doubt that as against Morrison and the second defendant, Lauriston, the plaintiffs were entitled to rely on this additional non-disclosure and that as against them it was sufficient to entitle the plaintiffs to avoid the policy. They maintain that they are also entitled to rely on it as against Mrs. Rackley, notwithstanding the fact that it was not mentioned in the notice. In my opinion, this contention is quite hopeless. True it is that the proviso to sub-s. 3 does not in terms say that, as against the third party, the insurer is to be confined to the particulars set out in his notice. The reason for this is that it was quite unnecessary for it to do so. If the insurer could, as against the third party, bring forward matters not specified in the notice the protection which the proviso gives could be rendered completely abortive. Atkinson J. was, in my opinion, manifestly right in his decision on this point.

The next matter relied on by the plaintiffs was the answer to question 2 in the proposal form. Atkinson J. held that the plaintiffs had failed to show that the answer given by Morrison to this question was untrue, and I agree with him. The question is hopelessly vague and I am quite unable to give any precise meaning to it. It is, to my mind, most unfortunate that questions framed in such a slovenly way

Lord Greene M.R.

should be put to a person making a proposal for insurance who may afterwards find himself accused of having given a false answer according to the construction which the insurer may, in his particular case, choose to put on the question. The practice is particularly vicious when, as in the present case, the proposer is required to warrant the truth of his answer. Questions of this kind are—I do not say designedly—mere traps, and insurance companies must not be surprised if they are construed strictly against them.

What, in my view, is the only matter of substance in the appeal relates to the non-disclosure of the alleged fact that Morrison " was the holder of only a provisional driving licence "who on being given a driving test had failed to pass such "test." I say " alleged " because one of the facts alleged was not true. Morrison did not hold a provisional licence, since the provisional licence which had been issued to him had been suspended as the result of his conviction, but it was the fact that he had failed to pass the driving test, and when he presented himself for another test at a later date it could not take place because he had arrived too late. The questions then arise whether this admitted non-disclosure was non-disclosure of a material fact within the definition of the word " material " in sub-s. 5 and whether on the facts the policy was " obtained " by it. In answering these questions Atkinson J. adopted the test laid down by the Privy Council in *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co., Ld.* (1), namely: " it is a question of fact in each "case whether, if the matters concealed or misrepresented had "been truly disclosed they would, on a fair consideration of "the evidence, have influenced a reasonable insurer to decline "the risk or to have stipulated for a higher premium." In my opinion, Atkinson J. was right in thinking that the same test is to be applied under the language of the present section. On the facts he held that the plaintiffs had not satisfied the test, and I agree with him. The evidence entirely fails to convince me that the insurers, had they known of the failure to pass the test, would have declined to issue a policy on precisely the same terms as those on which they did issue the policy in question. In truth, the witnesses called on behalf of the plaintiffs were obviously unable to disembarrass their minds of the knowledge that Morrison had been convicted and this led them to attribute a quite unwarrantable importance

(1) [1925] A. C. 344.

to the incident of the driving test. The matter was put in this way by Mr. Beyfus. He maintained that, even if he was not entitled to rely on the concealment of the conviction as a ground for avoiding the policy as against Mrs. Rackley, he was nevertheless entitled to prove that it had taken place as a fact, and that the importance of the non-disclosure in relation to the driving test was that, had the failure to pass it been disclosed, the plaintiffs would have been put on the track of the conviction. This argument is, in my opinion, unsound. It amounts to saying that, even if the non-disclosure on which the insurer is entitled to rely is not in itself sufficient for his purpose, it ought to be treated as sufficient because, had it not taken place, it would have led him to the discovery of a different non-disclosure on which, ex hypothesi, he is not entitled to rely. This appears to me to be quite inconsistent with what I have already found to be the true construction of the proviso to sub-s. 3. It involves reliance on a matter on which the insurer is precluded from relying. If the proviso prevents the conviction from entering by the front door, it cannot be allowed to climb in through the window. If the conviction had been discovered in the manner suggested it would have been the fact of the conviction, not the failure to pass the driving test, which would have led the plaintiffs to refuse to issue the policy.

If I am right in thinking that only matters referred to in the notice can be relied on, it seems to me to follow that the questions whether such matters are material and whether the policy was obtained by them must be examined on the artificial basis that, as between the insurer and the third party, all other statements made by the assured must be taken as true and all other material facts as having been disclosed. The result is to prevent the insurer from relying either directly or indirectly on any matter not specified in the notice as a ground or part of a ground for avoiding the policy as against the third party. The appeal must be dismissed, with costs.

MacKinnon L.J. I agree. Atkinson J. upheld the plea of Mrs. Rackley that the further matters specified in the amended statement of claim were not included in the notice to her of February 28, 1940, and, therefore, that "they cannot "now be relied on by the plaintiffs as against the defendant, "Mrs. Rackley," and I think he was clearly right. The provisions of the Act of 1934, in my view, are clearly intended to limit the grounds on which insurers can avoid the policy so as to defeat the claim of a third party in the position of Mrs. Rackley to those grounds which they have specified in the notice which the Act requires them to serve on the third party. Therefore, the plaintiffs' claim to avoid this policy so as to make it of no avail to Mrs. Rackley must be limited to that pleaded in the unamended statement of claim of February 3, 1941. That claim, apart from matters that were abandoned, relied on two misrepresentations and one matter of concealment. The misrepresentations were: (1.) the answer "Yes" to the question: "Have you (Morrison) driven cars regularly "and continuously in the United Kingdom during the past "twelve months?" and (2.) the answer "three years" to the question: "How long have you driven motor cars?" The alleged concealment was that Morrison was the holder of a provisional driving licence only (that is, that of a learner) and on going in for a driving test had failed to pass the test.

Under the general law of insurance an insurer can avoid a policy if he proves that there has been misrepresentation or concealment of a material fact by the assured. What is material is that which would influence the mind of a prudent insurer in deciding whether to accept the risk or fix the premium, and if this be proved it is not necessary further to prove that the mind of the actual insurer was so affected. In other words, the assured could not rebut the claim to avoid the policy because of a material representation by a plea that the particular insurer concerned was so stupid, ignorant, or reckless, that he could not exercise the judgment of a prudent insurer and was in fact unaffected by anything the assured had represented or concealed. But under the provisions of the Road Traffic Act, 1934, I think this general rule of insurance law is modified. The section requires the insurer to establish that the policy was "obtained" by non-disclosure or misrepresentation. In such a case as this, therefore, I think the plaintiffs must establish two propositions: (1.) that the matter relied on was "material" in the sense that the mind of a prudent insurer would be affected by it, and (2.) that in fact their underwriter's mind was so affected, and the policy was thereby obtained. The learned judge was not satisfied that the plaintiffs had established either of these propositions, and I agree with him.

In these circumstances, I am satisfied that the judge was amply justified in his conclusion that the plaintiffs had not established their case, and this appeal should be dismissed.

GODDARD L.J. Part II. of the Road Traffic Act, 1934, was passed to remedy a state of affairs that became apparent soon after the principle of compulsory insurance against third party risks had been established by the Road Traffic Act of 1930. That Act and the Third Parties' (Rights against Insurers) Act, passed in the same year, would naturally have led the public, at least those who were neither lawyers nor connected with the business of insurance, to believe that if thereafter they were, through no fault of their own, injured or killed by a motor car they or their dependants would be certain of recovering damages, even though the wrong-doer was an impecunious person. How wrong they were quickly appeared. Insurance was left in the hands of companies and underwriters who could impose what terms and conditions they chose. Nor was there any standard form of policy, and any company who could fulfill the not very onerous financial requirements that were necessary for acceptance as an approved insurer could hedge round the policies with so many warranties and conditions that no one advising an injured person could say with any certainty whether, if damages were recovered against the driver of the car, there was a prospect of recovering against the insurers. I myself once tried a case, *Richards* v. *Port of Manchester Insurance Co., Ld.* (1), where the insurers were enabled to escape liability if at the time of the accident the car was being driven by a Jew, a bookmaker, or an actor. It was indeed a state of affairs of which the words of Lord Moulton, in *Joel* v. *Law Union & Crown Insurance Co.* (2), were forcibly applicable. " I wish," he said in dealing there with a life policy, " I could "adequately warn the public against such practices on the "part of insurance offices. I am satisfied that few of those "who insure have any idea how completely they leave them-"selves in the hands of the insurers should the latter wish to "dispute the policy when it falls in." But in the case of motor car insurance it was the third parties who needed the warning, and unfortunately they had no voice as to the warranties or conditions that were inserted in policies, though it was only because they held a policy that careless drivers were enabled

(1) (1934) 50 Ll. L. Rep. 88. (2) [1908] 2 K. B. 863, 885.

to drive and put other persons in peril. It is not surprising, therefore, that by 1934 Parliament interfered, and by s. 10 of the Act of that year they took steps towards remedying a position which to a great extent nullified the protection that compulsory insurance was intended to afford. Generally speaking, s. 10 was designed to prevent conditions in policies from defeating the rights of third parties, but insurers were still allowed to repudiate policies obtained by misrepresentation or non-disclosure of material facts. This right, however, was made subject to certain conditions and restrictions contained in sub-s. 3 of s. 10. It seems to me that what the legislature had in mind was that, if an insurer was intending to repudiate a policy, it was only fair that the injured third party should know the grounds on which repudiation was sought before he went to the expense of endeavouring to establish his claim against the assured, who, if not entitled to indemnity, might be unable to satisfy a judgment. It was to prevent an injured party incurring further useless expense. Hence the necessity of the notice prescribed by the proviso to the sub-section. The protection afforded is little enough. As I have said, it is only because the company has issued a policy and a certificate of insurance that the motorist responsible for the accident was enabled to be on the road, but the result in such cases is that a widow, very likely, as here, in humble circumstances, who already has had to bring one action to establish her right to compensation, may then have to litigate points perhaps of considerable difficulty in insurance law with the insurers, and in the present case, but for the generous and gratuitous help afforded by the solicitors and counsel representing her, she would have got nothing.

The plaintiffs in this case contend that, if they once serve a notice specifying grounds on which at the time they serve it they intend to rely, they are at liberty to set up any further grounds of repudiation that they may think will help them and which they subsequently discover if they can get leave to amend their pleading, although the statutory period within which the notice must be served has expired. Now be it observed that, as against the assured who must be a party to the action, there is no limitation as to the grounds on which the policy can be disputed, so if something is discovered that was not known when the original pleading was delivered there may be good reason why an amendment should be granted. But there is every reason why it should not prejudice the third party. If by amending the defence the insurer can in effect add to the notice he has given to the third party the protection which, in my opinion, the proviso is designed to give to the latter is rendered nugatory. I have no hesitation in holding that, although the proviso does not contain words expressly precluding the insurer from setting up any grounds not mentioned in his notice, that is its effect. This construction was evidently that which appealed to this court in *Contingency Insurance Co., Ld.* v. *Lyons* (1), and though the court refused to stay the action, as there is no indication in any report that the case was ever tried, it is evident that the plaintiff realized that, in view of what the court said, it was hopeless to proceed with his action as against the third party. The plaintiffs cannot, therefore, rely on the conviction of the assured either as a misrepresentation or as a material fact which was not disclosed, and I agree with Atkinson J. in thinking that the case must be treated for all purposes as though the conviction had never happened. As the Master of the Rolls put it during the argument, anything not contained in the notice must, so far as it is a representation, be regarded as true, and so far as it was not disclosed must be treated as not material. Otherwise, one would be admitting by one door that against which the other was closed.

The plaintiffs being thus confined to the matters contained in their notice, the first matter alleged to be a misrepresentation or concealment is that the assured had not regularly or continuously driven motor cars during the twelve months preceding the proposal for a policy. I need not reiterate the facts, but this matter relates to one of the specific questions in the proposal form. It is a most embarrassing question, and if taken literally no one could answer it otherwise than in the negative. The plaintiffs' witnesses themselves do not seem to know precisely what is meant by it. Mr. Beston said it meant "at any rate several times a week," but when asked a few questions by the learned judge he soon went away from that. Mr. Jackson, the plaintiffs' underwriter, in answer to the learned judge, agreed that the point was to make sure that the assured was keeping his hand in, and that is what I should myself think was the correct view. In view of the experience of driving that the assured in this case had I see no ground for holding that this answer was untrue. Then he had driven cars for some years at such places as the Ebbw Vale Works, though he had not driven on public roads before

(1) (1939) 65 Ll. L. Rep. 53.

November, 1937, a year before he took out a provisional licence. I cannot see that the answer that he gave to the question "How long have you driven motor cars?" was untrue. If the plaintiffs want to know how long a man has driven on the road, or for how long he has held a licence, they should ask the question in plain terms. There may be many skilful drivers engaged at racing tracks or the private testing grounds of manufacturers who do not own a car of their own and so do not take out a licence and yet drive cars on the tracks very frequently. The next concealment that is alleged raises questions that are perhaps more debatable. In the notice to the defendant, Mrs. Rackley, it was stated that the assured was the holder of a provisional licence only, and on being given a driving test he had failed to pass it. In fact the provisional licence that he had held had been suspended owing to his conviction. But it is said that he ought to have disclosed that he had failed to pass the driving test. The evidence of the underwriters on this matter seems to me to be very unsatisfactory. Their real point is that had this been disclosed they would have made inquiries which would have led them to discover the conviction, which is just the matter on which they are not entitled to rely and which must, for the purpose of considering whether they are entitled to avoid the policy so as to defeat Mrs. Rackley's rights under s. 10 of the Act, be regarded as a non-material matter. But it is this that colours the whole of their evidence. I cannot believe that if they are willing to insure inexperienced drivers, one, for instance, who has never driven a car in his life, they would refuse to insure one who had received instruction, but had not got through his test the first time. It is common knowledge that many would-be drivers have failed several times. One result would be, if this were held material, that if a learner took out a policy admittedly as a learner with the 5*l.* excess clause in it, and had failed to pass a test before he applied for a renewal, he would have to disclose that fact, although all he was seeking was a renewal of the inexperienced driver class of policy. I do not think it would ever occur to any one in such circumstances to do so, yet if it is material, he has got only a voidable policy. I am well aware that if a fact is material and so ought to be disclosed it is no answer to say that the assured did not think it was material. Nor is it of itself a good answer to say "if it was "material why did not you ask." Underwriters cannot frame their questions so as to include everything that may affect any particular proposer, and the fact which ought to be disclosed may well be something peculiar to an individual case. But whether or not a person has failed in his test must, I should think, affect a very large number of proposers. The underwriter exhibits to them a long catechism in which he puts questions on matters which may affect any proposer, such as whether the car is to be used for hire, whether the person who will drive has any infirmity, or whether he had been convicted of any motoring offence, and I cannot help thinking that if it is material for the underwriter to know whether or not the proposer has failed in a test he would ask the question. The fact is that what the plaintiffs really regard as material is the conviction, and that if they had known that the assured had failed in the test that would have led them to find out that which was material, but on that they cannot rely in the present case. For myself I am not prepared to hold, on this evidence, that the mere fact that the assured had failed in his test was material to underwriters who were issuing an inexperienced driver's policy. In any case, I am convinced, as was the learned judge, that had the fact been disclosed the assured would have got exactly the same policy that was issued in this case and, consequently, that it was not obtained by non-disclosure of a material fact.

Appeal dismissed.

Solicitors for plaintiffs: *A. E. Wyeth & Co.*
Solicitors for defendants: *E. & J. Mote, for Carter & Fisher, Torquay.*

P. J. B.

SEA AND LAND SECURITIES, LIMITED *v.* WILLIAM DICKINSON AND COMPANY, LIMITED.

C. A.
1942
Mar. 30.

Shipping—Charterparty—Time charter—Ship waiting for turn to load cargo—Fitted by owners with degaussing apparatus at charterer's suggestion—Liability of charterers for hire.

During the currency of a time charter a ship, by the direction of the charterers, arrived in port to load a cargo, and it then appeared that she would have to wait for some days before she

Reported by C. G. Moran, Esq., Barrister-at-Law.

could be loaded. At the charterers' suggestion, the shipowners took the opportunity to fit the ship with degaussing apparatus. After the expiration of eight days, twenty-one hours, and forty-five minutes of this work there was room for the ship to load and she was loaded. Thereafter, the fitting of the degaussing apparatus was completed in a further period of one day and thirteen hours. The charterers deducted hire under the charter for ten days, ten hours and forty-five minutes. There was no clause in the charter providing that in the events which happened the hire should cease :—

Held, that there had been no breach of contract by the shipowners, because during the first period during which the ship was fitted with this apparatus she was at Blyth in enforced idleness, there being no direction by the charterers that the ship should proceed on another voyage and the fitting of the apparatus, which had to be completed during the second period, was done at the suggestion of the charterers, and that, accordingly, the charterers' claim to deduct hire failed.

Per MacKinnon L.J. The charterers' continuous liability under the charterparty to pay hire would only be interrupted if there were a provision in the contract by which it was agreed that in certain events there should be no such payment and such an event had happened.

Judgment of Atkinson J. [1942] 1 K. B. 286 reversed.

APPEAL from Atkinson J. (1).

On October 23, 1939, the charterers, William Dickinson & Co., Ld., hired the steamship *Alresford*, belonging to Sea and Land Securities, Ld., on time charter " for six calendar months "from the time the steamer is delivered and placed at the "disposal of the charterers ready to load." The charterparty contained (inter alia) the following provisions : Cl. 2 : " The "owners shall provide and pay for all the provisions and wages, "and for the insurance of the steamer, and for all deck and "engine-room stores, and maintain her in a thoroughly efficient "state in hull and machinery for and during the service." Cl. 5 : " The charterers shall pay as hire for the steamer : (15*s*.) "Fifteen shillings on steamer's deadweight as above per calendar "month, commencing from the time the steamer is placed at the "disposal of charterers and pro rata for any fractional part of a "month . . . . until her re-delivery to owners as herein stipulated . . . ." Cl. 12 : " In the event of loss of time from "deficiency of men or owner's stores, breakdown of machinery, or "damage to hull or other accident preventing the working of the "steamer, and lasting more than twenty-four consecutive hours, "the hire shall cease from the commencement of such loss of time

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(1) [1942] 1 K. B. 286.

"until she be again in an efficient state to resume her service; "but should the steamer be driven into port or to anchorage by "stress of weather, or from any accident to the cargo, or in "the event of the steamer trading to shallow harbours, rivers "or ports where there are bars causing detention to the "steamer through grounding or otherwise, time so lost and "expenses incurred (other than repairs) shall be for charterers' "account." Cl. 14 was an exceptions clause in common form which contained no mention of degaussing. On March 19, 1940, the ship, which had been sub-let by the charterers, by their direction, put into Blyth to load a cargo of coal. As there would be a delay for at least a week before she could be loaded, the charterers suggested to the shipowners that the opportunity should be taken to fit the ship with degaussing gear and the ship-owners acceded to the suggestion. Accordingly, the *Alresford* was sent to the wharf of the Blyth Dry Docks and Shipbuilding Co., Ld., for fitting, where she remained for eight days, twenty-one hours and forty-five minutes. The fitting of the degaussing apparatus was then interrupted and the ship was loaded with her cargo. She returned to have the fitting of the degaussing apparatus continued, it being completed in a further period of one day and thirteen hours. Paragraph 9 of the case stated by the umpire was in these terms: "Whilst it was admitted that the time charterers "had suggested to the owners that the opportunity should "be taken to fit the apparatus at Blyth, there was no agreement "or understanding that the vessel should continue on hire "whilst this was being done, or otherwise. Had the owners "not accepted the suggestion, it would have been quite easy "for the time charterers to fill in the intervening time by putting "the vessel in for a cargo from the East coast, which voyage "would have occupied about 14 days. The degaussing "apparatus was fitted according to the plans and under the "supervision of the Admiralty officials, and the work could "not be done and was not done during the operation of loading. "The vessel was, therefore, not at the disposal of the time "charterers whilst the apparatus was being fitted." The charterers claimed that during the degaussing period the *Alresford* was off hire and they withheld 1083*l*. 19*s*. 4*d*., a proportionate part of the hire, contending that there was an interruption of the contract, as the vessel had been withdrawn from their use during that period by the shipowners. The shipowners contended that hire was payable throughout the

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whole contract period, but that, if the withdrawal constituted a breach of contract, which was denied, the remedy lay in damages. The umpire upheld the contention of the charterers, as also did Atkinson J. (1). The shipowners appealed.

Sir Robert Aske K.C. and *A. W. Roskill* for the shipowners. When there is a provision in a charterparty to pay hire that hire has to be paid throughout the term, unless there is an express provision in the charterparty to the contrary in an event which has happened. If there is a breach of the contract by the shipowner, the charterer, if sued for the hire, can counterclaim for damages: see observations of Lord Ellenborough in *Havelock* v. *Geddes* (2), *Ripley* v. *Scaife* (3) and *French Marine* v. *Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* (4). [He was stopped.]

A. J. Hodgson for the charterers. If inability to use the ship is due to the action of the shipowner, hire ceases to be payable by the charterer. Lord Ellenborough said in *Havelock* v. *Geddes* (2): "As these pleas, therefore do not "show that it was owing to any default in the plaintiff, that "the defect in the ship occurred, or that there was any delay in "repairing it, ... we are of opinion that no deduction is to "be made from the freight on that account." As Atkinson J. said: (5) "That appears to me to indicate that if the time "lost had been due to any default in the plaintiff or to some "delay on his part in repairing, the hire would not be payable "for the period in question . . . . The case seems to me to "support the opinion expressed in Abbott (6) and Maude & "Pollock (7) and is, indeed, one of the authorities on which "they rely for their statement that, if the charterer is deprived "of the use of the ship owing to some act on the part of the "owner, hire is not payable." *Havelock* v. *Geddes* (2) was approved by Lord Blackburn in *Inman Steamship Co., Ld.* v. *Bischoff* (8), who cited the passage from Maude & Pollock on Merchant Shipping, 3rd ed., p. 235; 4th ed., vol. i., p. 299, which is set out in the judgment of Atkinson J. (9). The

(1) [1942] 1 K. B. 286.
(2) (1809) 10 East 555, 566.
(3) (1826) 5 B. & C. 167.
(4) [1921] 2 A. C. 494.
(5) [1942] 1 K. B. 293.
(6) Abbott's Law of Merchant Ships and Seamen, 14th ed., 679.
(7) Maude & Pollock on Merchant Shipping, 4th ed., vol. i., 378.
(8) (1882) 7 App. Cas. 670, 684.
(9) [1942] 1 K. B. 286, 290.

services of the vessel were not available to the charterers during the relevant period through the action of the shipowners and to that extent the consideration failed. [*Wehner* v. *Dene Steam Shipping Co.* (1); *Aktieselskabet "Lina"* v. *Turnbull & Co.* (2) and *Modern Transport Co., Ld.* v. *Duneric Steamship Co.* (3) were cited.]

MACKINNON L.J. The rights and obligations of the parties to a time charterparty must depend on its written terms, for there is no special law applicable to this form of contract as such. A time charterparty is, in fact, a misleading document, because the real nature of what is undertaken by the shipowner is disguised by the use of language dating from a century or more ago, which was appropriate to a contract of a different character then in use. At that time a time charterparty (now known as a demise charterparty) was an agreement under which possession of the ship was handed by the shipowner to the charterer for the latter to put his servants and crew in her and sail her for his own benefit. A demise charterparty has long been obsolete. The modern form of time charterparty is, in essence, one by which the shipowner agrees with the time charterer that during a certain named period he will render services by his servants and crew to carry the goods which are put on board his ship by the time charterer. But certain phrases which survive in the printed form now used are only pertinent to the older form of demise charterparty. Such phrases, in the charterparty now before the court, are: "the owners agree to let," and "the charterers agree to hire" the steamer. There was no "letting" or "hiring" of this steamer. Then it is in terms provided that at the end of the period the vessel shall be "redelivered" by the time charterers to the shipowners. "Redelivery" is only a pertinent expression if there has been any delivery or handing over of the ship by the shipowner to the charterer. There never had been any such delivery here. The ship at all times was in the possession of the shipowners and they simply undertook to do services with their crew in carrying the goods of the charterers. As I ventured to suggest quite early in the argument, between the old and the modern form of contract there is all the difference between the contract which a man makes when he hires a boat in which to row himself about and

(1) [1905] 2 K. B. 92.
(2) 1907 S. C. 507.
(3) [1917] 1 K. B. 370.

the contract he makes with a boatman that he shall take him for a row.

In the present case the charterers claim that they need not pay hire during a period of ten days, ten hours and forty-five minutes. Can they establish that claim? The material terms of the contract were that the shipowners were to carry in their ship such goods as were loaded by the charterers to such destinations as were directed by the charterers during a named period of time, and that during that period of time, in return for the services rendered by the shipowners, the charterers should pay to the shipowners hire of so much for each month and part of a month. Under that form of charterparty during the named period, until what is called "redelivery" (which only means until the agreed period has expired), the charterers have, during each month and part of a month, to pay to the shipowners the agreed sum, and their continuous liability to pay that sum would, I think, only be interrupted if there were a provision in the charterparty for some period during which there is to be no payment notwithstanding the other terms of the contract. Such a clause is cl. 12 in this contract, but the events which happened do not come within the terms of that clause, and the charterers cannot point to any provision in the charterparty that in the circumstances they are to be relieved from paying the hire.

This contract, however, like any other contract, would be subject to the incident that, if the shipowners during any particular period of time failed to render to the charterers the services which they had agreed to render, that is to say, if they committed a breach of their contract, the charterers would be entitled to damages for that breach. The measure of the damages would be at any rate the amount of hire which the charterers have to pay for the services of the shipowners, and the amount might be more. But I am unable to find that there was any such breach here.

Atkinson J. has followed, I think, too literally a statement made by the umpire in para. 9 of the case stated, that "the "vessel was, therefore, not at the disposal of the time charterers "while the [' degaussing '] apparatus was being fitted." He used phrases in his statement of the facts of which the following are typical: "the time charterers were deprived of the use "of the ship"; "the ship was deliberately withdrawn from "the use of the charterers"; "they were deliberately deprived "of the use of the ship"; "the use of the ship was withdrawn "from the use and the service of the charterers." What is the real question we have to consider? For that, one must refer to the charterparty and see what is the nature of the contract. By it the shipowners agree to render certain services and do work and labour for the charterers by the agency of their servants and crew. While the ship is waiting at Blyth for her cargo she is doing everything that the shipowners need do for the charterers. I think it is incorrect to use such phrases as those which I have quoted, merely because during that period the shipowners were doing some work of their own especially as they did it at the suggestion of the charterers themselves. As I suggested during the course of the argument, if, when the vessel is necessarily waiting for her cargo, the shipowners turned the crew on to chipping rusty plates or to painting the vessel, the charterers could not object that if the ship were loaded, she ought to be sailing the seas instead of being chipped, or painted, in dock. The fact is that the ship could not be sailing the seas because she was in enforced idleness, and it did not matter to the charterers how the shipowners chose to employ their servants while they could not be performing their promise to carry the charterers' goods under the contract. For that reason the charterers cannot claim that during the first period of waiting at Blyth, that is, for the first eight days and twenty-one hours and forty-five minutes, they can have any claim for breach of contract.

It is not so manifest that the charterers are not entitled to refuse to pay hire in respect of the second period of one day and thirteen hours which were occupied in completing the fitting of the degaussing apparatus after the cargo had been loaded, but I think they also fail in their claim to be relieved from paying hire for that period. It is manifest that during that time the shipowners were only doing that which the charterers had themselves suggested they should do. The putting in of the degaussing apparatus had to be completed, and while the shipowners were having that done I do not see that there was any breach of contract on the part of the shipowners. They were only doing that which the charterers had suggested that they should do and approved of their doing.

In these circumstances I think that the claim of the charterers to be relieved from paying hire during either or both of these periods fails, and that the award in their favour, which was upheld by the learned judge, should be set aside. The decision of the court upon the question reserved is that the charterers are not entitled in law to any relief from their liability under the charterparty.

GODDARD L.J. I agree. I do not find it necessary to consider the cases to which Atkinson J. referred in his judgment or any of the other interesting points which he raised, because with all respect to him, I think he drew a wrong inference from the facts of the case. If the case had been that, when the ship arrived at Blyth, it was found she could not load immediately, and the shipowners had suggested fitting degaussing apparatus, and the time charterers had said that they did not want that to be done as they wanted the vessel sent on another voyage, different considerations would have arisen. That is not what happened. The ship being unable immediately to take on board her cargo, the charterers suggested to the shipowners that it would be a good thing to occupy the time during which the ship would be detained by fitting degaussing apparatus to her, and the shipowners agreed and had the work done. How, in those circumstances, it can be said that the shipowners committed any breach of their contract to the charterers I cannot understand. The shipowners were entitled to receive hire for their ship unless they failed to render the services to the charterers which they had contracted to render to them, and I can see nothing which entitles the charterers to say they were deprived of the use of the ship at any time. What was done was done at their suggestion and with their consent, and there is no ground on which the shipowners can be deprived of part of the hire for the time this work took. I agree that the order mentioned by MacKinnon L.J. should be made.

DU PARCQ L.J. I agree. I think it is impossible, when one looks at para. 9 of the case stated, to make any different order here from that which has been mentioned by my Lord.

Appeal allowed.

Solicitors for shipowners: *Sinclair, Roche & Temperley, for Botterell, Roche & Temperley, Newcastle-on-Tyne.*

Solicitors for charterers: *William A. Crump & Son.*

REX *v.* GOVERNOR OF BRIXTON PRISON.

Ex parte LANNOY.

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Mar. 18, 31.

Alien—Detention—Leave to land—Refusal by immigration officer—No preceding request by, or intention of, alien to land—Aliens Order, 1920 (*St. R. & O.* 1920, *No.* 448), *art.* 3 (4.).

An alien was arrested on the high seas by order of a British competent naval authority and taken to Freetown, Sierra Leone. An expulsion order having been made against him under s. 3 of the Aliens (Expulsion) Ordinance, 1939, he was placed in custody in Dutch ship and brought to Avonmouth. He made no request to land in the United Kingdom and there was no evidence that he intended or even wished to do so. An immigration officer went on board the ship at Avonmouth, informed the alien that he would be refused leave to land, took over his custody and removed him to Brixton Prison. On an application by the alien for habeas corpus, his detention through the action of the immigration officer was supported on the authority of art. 3 (4.) of the Aliens Order, 1920, which provides for the detention of an alien, " where leave to land is refused " to him :—

Held (by Humphreys and Singleton JJ., Viscount Caldecote C.J., dissentiente), that the detention of the alien was valid since leave to land had been refused to him by the immigration officer within art. 3 (4.) although the refusal was not in response to a request by the alien to be allowed to land.

APPLICATION for habeas corpus.

The applicant, Roger Henri Lannoy, was a Belgian national and the respondent was Major A. C. H. Benke, the governor of Brixton Prison. On November 7, 1941, a naval officer from H.M. Destroyer *Brilliant* boarded the Portuguese steamer *Angola* when on a voyage from Lisbon to the Belgian Congo, arrested the applicant on board, removed him to the *Brilliant*, landed him at Freetown, Sierra Leone, and transferred his custody to the authorities there. On November 8, 1941, an expulsion order was made against him by the deputy-governor of Sierra Leone pursuant to s. 3 of the Aliens (Expulsion) Ordinance, 1939. He was detained in custody at Sierra Leone until November 29, 1941, when he was placed in a Dutch ship, *S.S. Vollendam*, and, still under arrest, was brought to Avonmouth, England, where he arrived on December 21, 1941. An immigration officer appointed under the Aliens Order, 1920, and stationed at Bristol, handed to the applicant a refusal

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Reported by C. G. Moran, Esq., Barrister-at-Law.

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slip in the following terms: "Leave to land has been refused "in the case of the alien passenger named Roger Lannoy, "a subject of Belgium brought to the port of Bristol in the "ship *Vollendam* from the port of Freetown. Grounds of "refusal: art. 1 (1.) (*a*) [of the Aliens Order, 1920 (1)]." The applicant was then taken into custody by a constable, and on December 22, 1941, was taken to Brixton Prison under art. 3 (4.) of the Aliens Order, 1920, where he remained detained.

The applicant did not at any time apply for leave to land in the United Kingdom and there was no evidence that he intended or even wished to enter the United Kingdom. On February 26, 1942, the applicant applied to Asquith J. for habeas corpus. The judge adjourned the application for hearing by a Divisional Court in order that notice of the application should be given to the respondent. On March 13, 1942, the Home Secretary gave a direction for the detention of the applicant pursuant to art. 5A of the Aliens Order, 1920, inserted in that order by virtue of the Aliens (No. 2) Order, 1941.

The legality of the detention of the applicant before December 21, 1941, and on and after March 13, 1942, was not questioned. The sole matter in issue was the legality of the detention of the applicant between those dates. The applicant admitted that he could not now claim his release from detention, but asked for the costs of the application.

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(1) By Aliens Order, 1920, art. 1 (1.): ". . . . an alien "coming by sea to a place in the "United Kingdom . . . . (*a*) shall "not land in the United Kingdom "without the leave of an immigration officer . . . ."

Art. 3 (4.): "Where leave to "land is refused to an alien, the "alien may either—(*a*) with the "leave of an immigration officer, "be placed temporarily on shore "and detained at some place "approved by the Secretary of "State; or (*b*) be removed from "the ship by, or under the directions of, an immigration officer, "and so detained; and whilst "an alien is so detained, he shall "be deemed to be in legal custody "and not to have landed."

By art. 5A (inserted by Aliens (No. 2) Order, 1941) St. R. & O., No. 1902: (1.) "Where the "Secretary of State is satisfied "that any alien has been brought "or sent to the United Kingdom "by order of a competent naval, "military, or air force authority, "he may, if in his opinion it is "necessary or expedient so to "do for securing the public safety, "the defence of the realm, the "maintenance of public order or "the efficient prosecution of any "war in which His Majesty may "be engaged, direct that the alien "be detained."

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G. O. Slade for the applicant. The applicant was never refused leave to land within the terms of art. 3 (4.) of the Aliens Order, 1920, for he never asked for leave, or sought, to land. The word "leave" implies an intention or volition to land on the part of the applicant. The words to be construed are: "where leave to land is refused." They are not "where leave to land is not given"—words used in art. 1 (3.) of the order. The whole of art. 3 is directed to the case of an alien "seeking to land": see art. 3 (1.). The verb "refused" postulates a request to land. The applicant made no such request. From the time of his arrest in the *Angola* he was under constraint. The officers of the Crown brought him to Avonmouth and landed him there and the immigration officer cannot claim that he refused the applicant leave to land. If the detention of the applicant on December 21, 1941, is legal, an immigration officer can visit a ship voyaging in times of peace from New York to Rotterdam, when she puts in at Southampton and, handing a refusal slip to any Dutch passenger or other alien en route for Holland, inform him that he is refused leave to land, arrest him, and lodge him in Brixton Prison. In fact, the officers of the Crown forced the applicant to land and yet by the terms of art. 3 (4.), if applicable, he is deemed "not to have landed." *Rex* v. *Governor of Brixton Prison. Ex parte Sarno* (1) and *Eshugbayi Eleko* v. *Officer Administering Government of Nigeria* (2) were referred to.

Sir Donald Somervell A.-G. and *Valentine Holmes* for the respondent. The sole issue is whether the applicant was refused leave to land within the meaning of art. 3 (4.) of the Aliens Order, 1920. On reading the order, it is clear that the verb "land" does not refer merely to the physical fact of landing. The words "leave to land" mean "leave to land and "be at large": see especially the terms of art. 1 (3.). Leave to land granted by the immigration officer under art. 1 (1.) (*a*) would be leave to land and be at large, and a refusal of such leave is a refusal to allow the alien to land and be at large. Art. 3 (4.) deals only with temporary detention. Sub-clause (*a*) applies to a case where the alien is removed from the ship with the approval of the master with a view to his being returned to the ship when she is ready to leave the port: see art. 3 (5.). Sub-clause (*b*) is designed to meet such a case as this, where the alien has given ground for suspicion and

(1) [1916] 2 K. B. 742.

(2) [1931] A. C. 662.

inquiries have to be made whether the Secretary of State should not give a direction under art. 5A. In such a case the alien cannot be allowed to continue his voyage or to be at large until those inquiries have been completed. If the applicant's contention is correct, the purpose of art. 3 (4.) will be defeated. [HUMPHREYS J. Apparently the immigration officer refused the applicant leave to land in order to make him land.] He refused him leave to land and be at large. Consider the position where an alien is brought here and the master of the ship puts him ashore. The immigration officer can either allow him to go free and at large or temporarily detain him. If he elects to detain the alien, art. 3 (4.) affords the procedure for restraint whether the alien lands of his own volition, is brought to this country in custody, or is put on shore by the master of the ship. In each case the officer can refuse leave to the alien to land and be at large. Here the applicant was brought to this country in custody and was about to be put on the quayside by those who had his custody. Art. 3 (4.) would not be applicable to the case of free aliens in a foreign ship calling at a port in the United Kingdom who did not propose to land, but to continue on their voyage, but art. 3 (4.) does apply where the alien is brought here by compulsion. The Secretary of State cannot act under the terms of art. 5A until he is satisfied that it is necessary or expedient to detain the applicant for securing the public safety, the defence of the realm, the maintenance of public order, or the efficient prosecution of the war. Meanwhile, art. 3 (4.) afforded the only certain authority under which the applicant could be detained while inquiries were made, although in some cases reg. 18 (3.) of the Defence (General) Regulations, 1939, would apply. Art. 3 (3.) would apply, if the applicant landed of his own volition.

Slade replied.

Cur. adv. vult.

Mar. 31. The following judgments were read.

VISCOUNT CALDECOTE C.J. If the applicant was refused leave to land within the meaning of art. 3 (4.) of the Aliens Order, 1920, it is not in dispute that his detention was throughout lawful. The question, therefore, for our decision is whether the applicant was so refused leave to land.

The substance of the argument of the Attorney-General was that the language of art. 3 (4.) should be read as if the word

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"refused" meant "not given," and that, if art. 3 (4.) does not cover the present case, there is no power to detain an alien, apart from the new art. 5A of the order. The interpretation of art. 3 (4.), for which the Attorney-General contended, would have the effect of giving power to an immigration officer at a port in the United Kingdom to take into custody aliens who happened to be passengers on a ship calling there, even though they had no intention of landing and made no application for leave to land. On that footing, the immigration officer would only have to say that leave to land was refused in the case of any aliens whom he desired to arrest in order to give himself the necessary power. Such a power might conceivably, in time of war, be taken under authority given by Parliament to the Home Secretary or other Minister of the Crown, and it would be easy to find plain words to give effect to it. I find it difficult, however, to believe that the words, which we have to construe, were designed to have the effect suggested by the Attorney-General. It is, no doubt, true that unusual and far-reaching powers are necessary in war-time for the defence of the realm. The Aliens (No. 2) Order, 1941, art. 2, which provided for the insertion of art. 5A in the Aliens Order, 1920, by which the Secretary of State was empowered to direct the detention of the applicant, illustrates the extent to which Ministers have been armed with extraordinary powers. Reg. 18 (3.) of the Defence (General) Regulations, 1939, is another illustration.

In construing art. 3 (4.) of the Aliens Order, 1920, I have the misfortune to differ from the other members of the court, and that fact naturally makes me hesitate to express the opinion which, nevertheless, I have formed. Leave to land can, in my judgment, only be said to be "refused" within the meaning of art. 3 (4.) to someone who has asked for leave to land, or is seeking or attempting to land without leave, or whom the master or other authority proposes to put on shore against his wish. The Attorney-General's argument could not, as I think, succeed, unless different words were substituted for the words used in the article. Having formed this opinion, I think the applicant should have his costs.

HUMPHREYS J. I regret that I have arrived at a different conclusion from that of the Lord Chief Justice. If nothing more were involved than a question of costs, I should have deferred to the view of the Lord Chief Justice, as costs are always a matter of discretion, but, as our decision may affect other cases, past or future, and the case has been fully argued, I think it my duty to state my own opinion.

If I rightly understood the argument of the Attorney-General, it was that sub-cl. (*a*) of art. 3 (4.) of the Aliens Order, 1920, is intended to apply to the case of an alien who is removed from the ship at the request or with the approval of the master with a view to his being returned to the ship when she is ready to sail: see art. 3 (5.), which imposes on the master of the ship in which the alien arrives the duty of removing him from the United Kingdom, (hence the word "temporarily" in sub-cl. (*a*)), while sub-cl. (*b*) is designed to deal with an undesirable alien who cannot be allowed either to be at large in this country or to continue his voyage until inquiries about him are complete. It may, for instance, be necessary to consult the representatives in this country of the country of which the alien is a national. In such a case, it is argued, it is essential that power should be given to the immigration officer to detain the alien pending inquiries and such power is conferred by art. 3 (4.) (*b*). If that is so, it is unfortunate that the power of detention was not conferred in simple and unambiguous language instead of in words making it appear that the ground of detention is the refusal of leave to land, whereas that refusal is merely a preliminary step. The Attorney-General expressly disclaimed any right of permanent detention under art. 3 (4.), claiming only the power to detain the alien pending a final decision on his case, and the affidavit of Sir Alexander Maxwell, Permanent Under-Secretary of State at the Home Office, suggests that this was the view acted on in this case.

Mr. Slade, for the applicant, argued that it was absurd to speak of a person as having been refused leave to do something which he has never asked or desired permission to do, and he contended that the word "refusal" postulates a request. I am not prepared to go that length. I see no reason why a landowner who puts up the familiar notice: "Trespassers "will be prosecuted," cannot accurately be described as refusing leave to the public to go on his land, although no member of the public has ever applied for such leave. No doubt, the word "refusal" is commonly used in connection with a previous request and it may well be that such was the intention of the draftsman here seeing that the article is one dealing, at least in part, with aliens who are seeking to land in the United Kingdom. That, however, is a different proposition from holding that there cannot be an anticipatory refusal. That there was in fact a refusal of leave to land in this case is beyond dispute, and I am not prepared to hold that the refusal was without validity or effect merely on account of the absence of a request. Our attention was drawn in argument to the apparent inconsistency to be found in cl. (4.) and cl. (5.) of art. 3, the former providing that any alien to whom leave to land is refused may be removed from the ship and detained, while the latter appears to require that any such alien *shall* be removed from the United Kingdom by the master of the ship in which he arrived. A possible explanation of this may be found in the fact that cl. (5.) became part of the order in 1923, while cl. (4.) was not added until September 1, 1939.

Mr. Slade indulged in some further destructive criticism of the order which, to my mind, was not altogether successfully met by the Attorney-General. The conclusion, however, at which I have arrived is that the Aliens Order, 1920, in its present form cannot be regarded as a single piece of legislation. It is rather a patchwork which has been so frequently added to, altered, amended and in parts revoked, that little of the original pattern remains, and any attempt to harmonize its various parts is foredoomed to failure. But the courts cannot, on that account, refuse to give effect to those parts of the order which are essential to the defence of the realm in time of war, and, in my view, the only safe canon of construction to be adopted in such a case is to see whether the words in the order which are relied on are wide enough to cover the facts of the case, without giving to those words a strained or unnatural meaning. Applying that test I think that there was in this case a refusal to the applicant by the immigration officer of leave to land in the United Kingdom within the meaning of cl. (4.) of art. 3. It follows that the applicant is deemed to have been in legal custody at the material time.

SINGLETON J. The only question for our consideration is as to the legality of the detention of the applicant between December 21, 1941, and March 13, 1942.

Sir Alexander Maxwell, the Permanent Under-Secretary of State for Home Affairs, in his affidavit sworn on March 14, puts the matter in this way: "After his arrival in this "country [the applicant] was detained under art. 3 (4.) of "the Aliens Order, 1920. The Secretary of State had to "consider whether he should direct that [the applicant] "should be detained under art. 5A of the Aliens Order, 1920, "and investigations into the case were being carried out. "Within the last few days information had been received "upon which the Secretary of State decided to make an "order under that article." The Attorney-General, on behalf of the respondent, the governor of Brixton Prison, submitted that leave to land had been refused to the applicant as shown by the affidavit of the immigration officer, and that this being so, he could be detained under art. 3 (4.) of the Aliens Order, 1920. Mr. Slade submitted that there could be no refusal of leave to land unless there had been a previous request by the applicant for leave to land and that there had been none. Indeed, said he, the applicant did not want to land in England at all.

The Aliens Order, 1920, has been amended on a number of occasions, one of which was on September 1, 1939 (which amendment included art. 3 (4.)), and it is reasonable to assume that the amendments of that date were made in anticipation of war. Art. 1 provides that an alien shall not land in the United Kingdom without the leave of an immigration officer. Art. 3 (1.) and (2.) deal with the case of an alien who is seeking to land in the United Kingdom. Art. 3 (3.) is not so limited in terms, but there can be no doubt as to the strength of the argument that the whole of art. 3 is directed to the case of a man who wishes to land in the United Kingdom. At the same time one must remember that the amendment of the order by the addition of art. 5A was made on November 27, 1941, and that if the argument on the part of the applicant is right, there was no power whatever to detain him in this country while the Secretary of State was considering whether a direction should be given under art. 5A or not. The validity of his detention in the ship was not attacked for the purposes of this case and we are to regard him as properly removed from the Portuguese ship and properly in the Dutch ship, but once he sets foot on shore at Avonmouth it is submitted that his detention was illegal.

It may well be that the ship was at the end of her voyage, and possibly she was due to start on another voyage at an early date. The master would naturally desire to be relieved of the applicant who had been handed over to his charge. No doubt, he would desire to put him ashore. The immigration officer, apprised of the position, refused to give leave to land. He knew of the master's desire. Why is an application from the applicant himself necessary before the immigration officer can refuse leave to land? Why can there not be a refusal in anticipation of a request? Consider the case of a party of alien refugees on a ship arriving at a port in this country. They wish to land somewhere, but not necessarily at that port. They do not put forward a request to land there. The master of the ship wishes to get them off his ship. The ship is required urgently. In such circumstances, can it be said that an immigration officer is not justified in saying, in advance, and without any request from them: "I shall refuse—and "I do refuse—permission to them to land"? Are they not then persons who fall within art. 3 (4.) of the order? If so, they can be dealt with under that article, that is, they can be detained temporarily. That is not to say that they will always be so dealt with.

It was put to us that, if the Attorney-General's submission were right, an immigration officer could, without any request, refuse permission to land to Dutch subjects in a ship calling at Southampton during a voyage from New York to Rotterdam in peace time and thus take off the ship passengers who did not wish to land and cause them to be dealt with under art. 3 (4.). This does not really help towards deciding the point before the court. One must assume that officials entrusted with duties under this order will act reasonably, and one must remember that the country is at war. The applicant was, so far as we are concerned, properly detained while on the ship. The immigration officer deposes to the fact that he refused him leave to land. Prima facie, then, the applicant could be dealt with under art. 3 (4.) and he was in lawful custody at all material times. The article is wide enough to cover this case, and I am of opinion that we ought to hold that it does so. It was obviously a more convenient course to deal with the applicant in this way rather than to leave him in the ship, while the Home Secretary was considering whether to give a direction under art. 5A, and it is reasonable to think that in most cases a decision would be arrived at more speedily, for art. 3 (4.) contemplates a temporary detention. In my view, this application should be refused.

Application refused, with costs.

Solicitors for applicant: *Buckeridge and Braune.*
Solicitor for respondent: *The Treasury Solicitor.*

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Mar. 23, 31.

WALLROCK *v.* EQUITY AND LAW LIFE ASSURANCE SOCIETY.

Landlord and tenant—Sub-lease—Tenant in default with rent—Sub-lessee served with notice to pay rent to superior landlord—Need of leave of court—" Levying of distress "—" Taking of possession of any " property "—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *s.* 6*—Courts (Emergency Powers) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (i.) (ii.).

By s. 6 of the Law of Distress Amendment Act, 1908: "In "cases where the rent of the immediate tenant of the superior "landlord is in arrear it shall be lawful for such superior landlord "to serve upon any under tenant . . . . a notice . . . . requiring "all future payments of rent, ... by such under tenant . . . . "to be made direct to the superior landlord giving such notice." By s. 1, sub-s. 2, of the Courts Emergency Powers) Act, 1939: "Subject to the provisions of this section, a person shall not be "entitled, except with the leave of the appropriate court,—(*a*) to "proceed to exercise any remedy which is available to him by way "of—(i.) the levying of distress: (ii.) the taking of possession of "any property":—

Held, that the giving of a notice under s. 6 of the Act of 1908 was not "the levying of distress" or "the taking of possession "of any property" within the meaning of s. 1, sub-s. 2, of the Act of 1939, and that there was nothing in that Act to derogate from the right given to the superior landlord by s. 6.

APPEAL from Birkett J.

The plaintiff was the holder of a lease from the defendants of certain premises for a term of ninety years from June 24, 1904, at a rent of 1200*l.* a year payable quarterly. Part of the premises was sub-let by the plaintiff to the Great Western Railway Co. at a rent of 1600*l.* a year. On July 28, 1941, the plaintiff having made default in payment of rent, the defendants obtained judgment against him for possession, 355*l.* arrears of rent, and 161*l.* 1*s.* 9*d.* mesne profit. On October 15, the defendants obtained leave under the Courts (Emergency Powers) Act, 1939, to proceed under their judgment, but that leave was suspended provided that the plaintiff paid 35*l.* to the defendants within seven days. By s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1940, the effect of the order suspending leave to proceed was that the lease must be deemed not to have been forfeited, but to continue in force so long as the judgment of July 28 remained unenforceable and rent was payable under it. On November 20, 1941, the defendants served on the Great Western Railway Co. a notice under s. 6 of the Law of Distress Amendment Act, 1908, stating that 438*l.* 18*s.* 3*d.* arrears of rent (which had accrued after the judgment of July 28) were due to them from the plaintiff and requiring that all future payments of rent by the Great Western Railway Co. be made direct to the defendants until such arrears should have been paid off. Pursuant to this notice, the Great Western Railway Co. paid 400*l.* to the defendants. On January 5, 1942, the plaintiff issued the writ in this action claiming a declaration that the defendants were not entitled to serve the notice on the Great Western Railway Co., an injunction to restrain them from acting on the notice or requesting or receiving payment under it, and damages. On January 19 the plaintiff issued a summons for an injunction in the terms of the writ, and on January 27, Birkett J. granted the injunction asked for. The defendants appealed. The order of Birkett J. in effect dealt with the whole substance of the action, and during the hearing of the appeal counsel agreed that the hearing before Birkett J. should be treated as the trial of the action and that the hearing before the Court of Appeal should be treated as a final appeal against judgment in the action.

Casswell K.C. and *Scott Henderson* for the defendants. There is nothing in the Courts (Emergency Powers) Act, 1939, to preclude the defendants from taking advantage of s. 6 of the Law of Distress Amendment Act, 1908. There is here no "levying of distress" or "taking of possession of any "property." A valuable right, like that given to superior landlords by s. 6, could not be taken away by emergency legislation save by the plainest terms.

Fortune for the plaintiff. Sect. 1, sub-s. 2, of the Act of 1939 should receive the widest interpretation. The rent paid by the under-tenant to the plaintiff is, prima facie, the property of the plaintiff, and by their notice the defendants seek to take possession of that property. "Taking of "possession" must mean the exclusion of someone else's right, and there is no reason for limiting the meaning of the word "possession." The defendants are also seeking to levy a distress within s. 1, sub-s. 2 (i.), of the Act of 1939. The object of s. 6 of the Act of 1908 is to avoid distress. The superior landlord, by serving this notice, implies that he has the right to distrain, but that right, except with leave of the

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appropriate court is taken away by sub-s. 2 of s. 1 of the Act of 1939.

Casswell K.C. replied.

Cur. adv. vult.

1942. Mar. 31. LORD GREENE M.R. read the judgment of the court (Lord Greene M.R., Luxmoore L.J. and Asquith J.): It is worth pointing out that in any event an injunction was not the appropriate interlocutory relief. It had the effect, not of keeping matters in statu quo, but of depriving the defendants of the subject-matter of the litigation. If relief was to be granted, it ought to have been the appointment of a receiver. The question for us, however, is the final determination of the issues raised in the action.

Section 6 of the Law of Distress Amendment Act, 1908, empowers a superior landlord, where rent is in arrear, to serve notice on an under-tenant requiring him to pay all future rent direct to the superior landlord until the arrears have been duly paid. The concluding words of the section are as follows: "And such notice shall operate to transfer to the "superior landlord the right to recover, receive, and give a "discharge for such rent."

One of the arguments put forward on behalf of the plaintiff was to the effect that the service of a notice under this section was the exercising by the superior landlord of a remedy "by way of the levying of distress," and was, therefore, prohibited by sub-s. 2 (i.) of s. 1 of the Courts (Emergency Powers) Act, 1939, except with the leave of the court. This argument is clearly inadmissible, since by no stretch of language can the special right conferred by s. 6 be described as a right of distress. A more attractive argument was based on para. (ii.) of sub-s. 2 of s. 1 of the Courts (Emergency Powers) Act, 1939, which prohibits "the taking of possession of any "property" except with the leave of the court. The effect of the service of a notice under s. 6 of the Law of Distress Amendment Act, 1908, is to vest in the superior landlord the lessee's right to receive the rent payable by the under-tenant, that is to say, it brings about a statutory assignment of a chose in action under which the superior landlord becomes entitled to obtain payment of the rent by the under-tenant. It is truly a case of self-help, and the superior landlord becomes entitled to exercise the right by reason of a default on the part of his tenant.

In this sense, therefore, the case may be said to be analogous to the cases of self-help against which the Courts (Emergency Powers) Act, 1939, gives protection, but the question is not to be answered by finding an analogy. Its answer depends on the language of the Act. Can it be said that the service of the notice is "the taking of possession of any property"? So far as the words "any property" are concerned they are, taken by themselves, wide enough to include a chose in action, and in the later words of the paragraph "the appointment of "a receiver of any property," they do, we think, clearly include that class of property. The difficulty is caused by the words "taking of possession." We were invited to say that these words can, by a liberal construction, be regarded as covering the statutory acquisition of the right to receive the rent from the under-tenant, but on consideration, we have come to the conclusion that this construction is not legitimate. In the absence of a clear context, the words "take possession" are suitable only to the case of physical things, and are entirely unsuitable to describe the legal operation which takes place under s. 6. If the word "possession" were intended by the legislature to apply to the statutory assignment of a chose in action which takes place under that section, it could not have chosen a more inappropriate word. We have searched in vain in legal literature for any justification for such a misuse of language, and we have found none, nor could counsel refer us to any. It may be that the existence of s. 6 escaped the notice of the legislature when it enacted the Courts (Emergency Powers) Act, 1939. It may be that the legislature had the section in mind and deliberately intended to exclude it from the scope of the Act, taking the view that it would be unjust to allow a tenant to receive rent from his sub-tenant while making default in payment of his own rent to his lessor.

However this may be, the legislature has not, in our opinion, used language which can, on any principle of interpretation, be strained to cover the case. It was suggested that although the words "take possession" are not apt to describe the serving of the notice and the consequential statutory assignment to the head lessor of the right to receive the rent from the sub-tenant, they do apply to the actual receipt of the rent when it is paid. Here again, however, the acceptance of payment of a debt which by force of the statute has become vested in the head lessor cannot, in our opinion, by any

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stretch of language be described as the "taking possession "of property" within the meaning of the Courts (Emergency Powers) Act, 1939. The head lessor receives the payment as being the person in whom the right to receive payment is vested. He receives it by virtue of that right, and the payment is nothing more nor less than a discharge of the obligation.

Lastly, it was said that the service of the notice on the Great Western Railway Co. was in some way or another illegitimate as being an evasion of the Courts (Emergency Powers) Act, or a circumvention of the order made thereunder. We do not follow this argument. The arrears of rent referred to in the notice had accrued due subsequently to July 28, 1941, and it was only with arrears of rent and mesne profits down to that date that the order under the Courts (Emergency Powers) Act dealt. The existence of the right conferred by s. 6 is a matter which affects the financial position of the plaintiff; and due weight must be given to it in any future review of that position under the Courts (Emergency Powers) Act, but this cannot have any bearing on the present question. The appeal is allowed with costs, and the action is accordingly dismissed with costs.

Appeal allowed.

Solicitors for defendants: *Rooper & Whately.*
Solicitors for plaintiff: *Finnis, Downey, Linnell & Price.*

P. J. B.

1942
Apr. 14.

SUTCLIFFE *v.* MINISTER OF HEALTH.

Pension — Widow — Insured person — Husband uninsured at date of marriage—Excepted employment of husband—Right to become voluntary contributor—Widows' Orphans' and Old Age Contributory Pensions Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 70), *ss.* 13, *sub-s.* 4; 15, *sub-s.* 7.

S. was an officer in a police force from which he retired on a superannuation allowance in 1919. That was an excepted employment for the purposes of the National Health Insurance Act, 1924, and no contributions would have been payable in respect of him if he had continued in that employment after January 4, 1926 (the date of the commencement of the Widows' Orphans' and Old Age Contributory Pensions Act, 1925), at which time S. had not attained the age of 70. In 1933 S. married an insured woman and applied to an approved society for admission as a voluntary contributor under s. 13, sub-s. 4, of the Act of 1925. Thereafter, till his death in 1939, S. paid the contributions payable by a voluntary contributor :—

Held, that his widow was not entitled to a pension since S. came precisely within s. 15, sub-s. 7, of the Act of 1925, which, with absolute particularity, declared him to be incapable of becoming an insured person, and he, therefore, could not bring himself within the general provision as to voluntary contributors contained in s. 13, sub-s. 4.

CASE stated by referees selected pursuant to s. 30, sub-s. 2, of the Widows', Orphans' and Old Age Contributory Pensions Act, 1936.

The claimant, Clara May Sutcliffe, claimed a widow's pension under s. 3 of the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, and contended that her late husband, James Herbert Sutcliffe (who had not attained the age of seventy before January 4, 1926), was insured at the date of his death. The Minister of Health rejected the claim on the ground that Sutcliffe was not an insured person at the date of his death. The question was referred to referees, who stated their award in the form of a special case under s. 9, sub-s. 1 (*a*), of the Arbitration Act, 1934 (which was made applicable to references under the Act of 1936 by reg. 16, para. 1, of the Contributory Pensions (References) Regulations, 1937 (St. R. & O., 1937, No. 1022). The referees found the following facts : James Herbert Sutcliffe had not attained the age of seventy on January 4, 1926 (the date of commencement of the Widows' Orphans' and Old Age Contributory Pensions Act, 1925). He died on May 7, 1939. He served as an officer in the Lancashire constabulary until September 30, 1919, when he retired on a superannuation allowance. His employment was an excepted employment to which s. 15, sub-s. 7, of the Act of 1925 (1) applied, and was such that, had he continued

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(1) By Widows' Orphans' and Old Age Contributory Pensions Act, 1925, s. 13, sub-s. 4 : "Where "an uninsured man marries an "insured woman by or in respect "of whom 104 contributions have "been paid under this Act, he "may if he gives notice within the "prescribed time after the marri-"age and in the prescribed manner "become a voluntary contributor "under the Insurance Act." [i.e., the National Health Insurance Act, 1924.]

By s. 15, sub-s. 7 : "Where a "person who has been employed "in an excepted employment to "which this section applies has, "on retirement from such employ-"ment, whether before or after "the commencement of this Act, "been granted a superannuation "allowance, then—(*a*) if he was a "person in respect of whom no "contributions were, or would "had he continued to be so in that employment beyond January 3, 1926, no contributions under the Act of 1925 would have been payable in respect of him. He was not, on January 4, 1926, an insured or exempt person. On February 4, 1933, he married the claimant, who was at that date an insured woman by or in respect of whom 104 contributions had been paid under the Act of 1925. Sutcliffe gave notice to an approved society within the time prescribed by the relevant regulations of his desire to become a voluntary contributor under the National Health Insurance Act, 1924, in accordance with s. 13, sub-s. 4, of the Act of 1925. On April 28, 1933, he was admitted by the society as a voluntary contributor and from that date he paid such contributions appropriate to a voluntary contributor as would, if he were correctly so admitted, entitle the claimant to a widow's pension under the Act of 1936.

The question for the court was whether, on the true construction of s. 13, sub-s. 4, and s. 15, sub-s. 7, Sutcliffe was entitled to become insured under s. 13, sub-s. 4.

Scott Cairns for the claimant. Sect. 13, sub-s. 4, is a unique provision, being the only case in which insurability is dependent, not on the applicant's own previous employment, but on his wife's. All that is required is for the husband to be uninsured and the wife insured at the date of the marriage. To hold that s. 15, sub-s. 7, does not apply to such a case still leaves an ample field to which that sub-section can apply.

Valentine Holmes for the Minister. On either of two well-established principles of the construction of statutes the Minister's decision must be right. Sect. 13, sub-s. 4, is a general provision and s. 15, sub-s. 7, is a particular provision of a limited kind, which, in accordance with the principle generalia specialibus non derogant, must prevail. Again, s. 15 being later in the Act than s. 13, the principle that, if two sections are inconsistent the later prevails, may be invoked (1).

"employed after the commencement of this Act have been, payable under this Act while he was so employed, he shall not be capable of becoming an insured person for the purpose of this Act . . . ."

[This sub-section of the Act of 1925, which was set out in the case stated, and referred to in the arguments and judgments in the Divisional Court, was in fact repealed and re-enacted without material alteration as s. 17, sub-s. 5, of the Act of 1936.]

(1) *Reporter's Note*.—A fortiori, it would seem, since the particular provision now depends on s. 17, sub-s. 5, of the Act of 1936, while the general is still contained in the Act of 1925.

[He was stopped.]

CHARLES J. The only question before the court is whether the claimant is entitled to a pension by virtue of s. 13, sub-s. 4, of the Act of 1925. Everything seems to have been done, on the face of it, which that section requires, but s. 15, sub-s. 7, of the Act singles out certain excepted employments in respect of which a man shall not in any circumstances be capable of becoming an insured person for the purposes of the Act. Sutcliffe comes directly within the terms of that sub-section. He is, therefore, with absolute particularity, declared to be incapable of becoming an insured person for the purposes of this Act. It follows that in no way can he come within the ambit of s. 13, sub-s. 4, which is the general section. Mr. Holmes has called the attention of the court to the general principle that of two conflicting sections the later prevails. That, no doubt, is well-decided law, but in my view these sections are not in conflict. Sect. 13, sub-s. 4, is a general section, but since Sutcliffe by reason of his occupation and position is absolutely excluded from any benefit, his widow cannot avail herself of it. For these reasons the conclusion to which I have come on the question propounded by the case is that James Herbert Sutcliffe was not insured and was not capable of being insured.

LEWIS J. I agree. I have come to the conclusion, I confess after some hesitation, that the proper view of these two sections is that s. 13, sub-s. 4, is a general section, to which s. 15, sub-s. 7, creates a particular exception, the effect of which is to disqualify a person in Sutcliffe's position from being capable of becoming an insured person. In my view, therefore, the proper answer to the question which we are asked is that Sutcliffe was not entitled to become insured by virtue of s. 13, sub-s. 4.

OLIVER J. I agree. I think s. 13, sub-s. 4, specifies a method of "becoming an insured person," namely, by marrying a woman who has paid a certain number of contributions. Sect. 15, sub-s. 7, which comes later, says that a person in the position of Sutcliffe is not capable of "becoming an insured "person." Having regard to its position in the Act, and to the general principles of construction, that sub-section certainly

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applies in this case, and makes it an exception from what is otherwise the general rule.

Question answered.

Solicitors for claimant: *Bolton, Jobson & Yate-Lee.*
Solicitor for respondent: *Solicitor to the Ministry of Health.*

J. W. H.

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Apr. 15, 16.

RACECOURSE BETTING CONTROL BOARD *v.* BRIGHTON CORPORATION.

Rates—Valuation—Totalisator—Profits basis—Contractor's basis—Award—Special case—Question of law not raised—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 22, *sub-s.* 1 (*b*).

Appeal from the decision of Wrottesley J., reported [1941] 2 K. B. 287, dismissed on the ground that the case as drawn raised no question of law which could be answered by the court.

APPEAL from Wrottesley J. (1) on an award stated in the form of a special case by the recorder of Brighton.

By the award the court was asked to say whether the arbitrator was entitled as a matter of law to adopt the "profits" basis in arriving at the rateable value of certain hereditaments occupied by the Racecourse Betting Control Board on the racecourse owned by Brighton Corporation. The premises in question were the buildings occupied by the board for the purpose of working a totalisator in them.

In 1935 the hereditaments occupied by the board on the racecourse were assessed at a rateable value of 288*l.* In February, 1938, the corporation, as rating authority, made a proposal that from April 1, 1938, the assessment should be 4300*l.* On March 15, 1938, the assessment committee fixed the rateable value at 2850*l.* Cross notices of appeal were given. By an agreement in writing the recorder of Brighton was appointed arbitrator in the matter. Before the arbitrator it was contended for the board that in arriving at the rateable value of the premises the "contractor's" basis should have been adopted. The corporation, on the other hand, contended that the "profits" basis was correct. The arbitrator held that the latter contention was correct, and

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(1) [1941] 2 K. B. 287.

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stated his award in the form of a special case for the opinion of the court. Wrottesley J. held that in arriving at the rateable value of the premises occupied by the board, it was correct to adopt the "profits" basis and not the "contractor's" basis so that the rateable value would be assessed on the gross amount retained by the board out of the money received by the totalisator after deduction of the expenses of the board. The board appealed.

Craig Henderson K.C. and *Simes* for the board.

Comyns Carr K.C. and *Geoffrey Lawrence* for the corporation.

During a discussion on the question whether or not the special case ought to be sent back to the arbitrator to be restated as it did not raise the question of law which the parties wished to be decided, it was stated by counsel for the board that there were seventy-two other cases which would be governed by the decision on this case.

MACKINNON L.J. suggested that the board would be well advised to drop this appeal and commence de novo, and get a case stated in which the question of law was properly raised.

Craig Henderson K.C. said that the board would be willing to adopt that suggestion provided it was made clear that no principle was to be drawn from Wrottesley J.'s decision as to the "profits" basis being the correct method to be adopted in rating totalisators.

MACKINNON L.J. said that the order of the Court of Appeal (MacKinnon, Luxmoore and Goddard L.JJ.) would be in the following form: Counsel for the appellants submitting to this appeal being dismissed, and the court being of opinion that having regard to the terms in which the special case is drawn, there is no question of law raised which can be answered by the court, and having the like regard, there was no such question before Wrottesley J., order that the appeal be dismissed with costs.

Appeal dismissed.

Solicitors for the board: *Sharpe, Pritchard & Co.*

Solicitor for the corporation: *J. G. Drew, Town Clerk, Brighton.*

R. F. S.

C. A.
1942
Apr. 17.

EARL FITZWILLIAM'S COLLIERIES COMPANY *v.* PHILLIPS (H.M. INSPECTOR OF TAXES).

Revenue—Income tax—Profits arising from lands, tenements and hereditaments—Deduction—Leave to let down surface—Half-yearly payments to surface owner—Easement—Finance Act, 1934 (24 & 25 *Geo.* 5, *c.* 32), *s.* 21.

Under a lease executed in 1935 certain mines, surface lands and works were demised to a company in consideration of rents and payments thereby reserved for a term of ninety-nine years. By cl. 2 the company were given the right, in working the minerals, to withdraw support from the surface overlying the area, without making any compensation for damage, except as thereinafter provided. Under cl. 5, in addition to certain rentals and royalties, the company was bound to pay half-yearly certain sums per acre of so much of the seams of coal as had been worked in the past half-year, as liquidated damages in respect of the overlying surface:—

Held, affirming Lawrence J., that the right to let down the surface was an easement within the meaning of s. 21 of the Finance Act, 1934.

Commissioners of Inland Revenue v. *New Sharlston Collieries Co., Ld.* [1937] 1 K. B. 583 followed.

Held further, that the payments were periodical payments in the nature of a rent and could not be deducted from the company's profits for the purposes of assessment to income tax.

APPEAL from Lawrence J.

By a lease dated January 31, 1935, Earl Fitzwilliam demised to the plaintiff company for a term of ninety-nine years from January 1, 1933, certain mines, surface lands and brick works in consideration of rents and payments thereby reserved. Under cl. 2 of the lease the company was given the right in working the mines to withdraw support from the surface overlying the area and from any buildings erected thereon without making any compensation for damage, except as thereinafter provided. Cl. 5 provided for the payments of various rents and royalties by the company, and sub-cl. 3 (*f*) provided for the payment of " The sum of 10*l.* per acre of "so much of the Parkgate seam and 5*l.* per acre of so much "of each of the other seams of coal demised as shall have "been worked and gotten during the preceding half-year as "liquidated damages in respect of the overlying surface." The company was assessed to income tax for the years 1934–1935 and 1935–1936 without any deduction being made in respect of the sums paid under cl. 5, sub-cl. 3 (*f*). The commissioners found that the right given by the lease to withdraw support from the surface was a grant of an easement within the meaning of s. 21, sub-s. 3 (*f*), of the Finance Act, 1934, and that the payments made under cl. 5, sub-cl. 3 (*f*), of the lease, although expressed to be liquidated damages in respect of overlying surface, were so related to the exercise of the right granted that they must be regarded as periodical payments in the nature of rent in respect of the easement. On appeal Lawrence J. upheld the findings of the commissioners. The company appealed.

F. Heyworth Talbot for the company. The question whether a payment is rent or not depends upon the consideration for which it is paid. Here the payments are distinguishable from a rent payable yearly because they are not periodical, and because they are not in consideration of occupation or user of a hereditament. The parties were providing for a composition for damages: they did not describe or treat it as a rent. On the easement point this case is covered, so far as this court is concerned, by *Inland Revenue Commissioners* v. *New Sharlston Collieries Co., Ld.* (1), though it may be difficult to reconcile that case with *Elliott* v. *Burn* (2). He also referred to *Inland Revenue Commissioners* v. *Hope* (3).

Sir Donald Somervell A.-G., J. H. Stamp and *R. P. Hills* for the Crown were not called on.

LORD GREENE M.R. In my opinion this is a clear case and the decision of Lawrence J. was manifestly right.

There are two questions involved. The first is whether the particular right in question is an easement within the definition in sub-s. 4 (*b*) of s. 21 of the Finance Act, 1934; the second is whether the payments in question are annual or periodical payments in the nature of rent within the definition in sub-s. 4 (*c*). On the first question Lawrence J. held that the case was covered by the decision of this court in *Inland Revenue Commissioners* v. *New Sharlston Collieries Co., Ld.* (1), and I need not repeat what the learned judge said with regard to that case.

The only distinction that Mr. Talbot endeavoured to draw between that case and the present was of the following nature. In the *New Sharlston* case (1) the company concerned started

(1) [1937] 1 K. B. 583.
(2) [1935] A. C. 84, 94, 95.
(3) (1937) 21 Tax Cas. 116.

off with the right to get the coal because they were the freehold owners of the coal, but their title did not confer upon them the right to let down the surface without compensating the owner of the surface for any damage. That provision was held by the House of Lords in the year 1900 as not operating as a surrender to the coalowners of the right to support incident to the surface lands (1). Accordingly, in the year 1901 the company proceeded to obtain from the then tenant for life of the surface lands full liberty to work the coal notwithstanding that the working might cause subsidence; but the company did not by that document obtain the right to work the coal without any liability to pay damages for any subsidence so caused and the question arose whether the right in respect of which the payments fell to be made in that case, namely, the right to work without leaving support for the surface, was an easement within the meaning of s. 21.

The distinction which it is attempted to draw between that case and the present is that the right in respect of which the payments in controversy here are to be made is a right which goes further than that which was acquired in the *New Sharlston* case (2), because it is the right to be exempt from any claim for damages caused by subsidence. It is said that here the appellants acquired the right to let down the surface, which meant that they acquired the right to act in relation to the land and to let down the surface without the liability to be restrained by injunction; that, it is said, the lease conferred upon them, and if the case had stopped there and the payment had been a payment in respect of that right, it is conceded that the *New Sharlston* case (2) would have covered it. It is contended, however, that the appellants are given an additional right which exempts them, in the exercise of the right already conferred upon them, from liability for damages and the payment is in effect nothing more or less than a composition paid for damages.

In my opinion that distinction is one which cannot stand in the light of the reasoning on which the decision in the *New Sharlston Collieries* case (2) was based. I do not propose to read passages from that decision, but in my view the distinction drawn is one which cannot be made good. I agree with the learned judge that the *New Sharlston* case (2) conclusively decides, so far as this court is concerned, that the

(1) *New Sharlston Collieries Co., Ld.* v. *Earl of Westmorland* [1904] 2 Ch. 443*n*.

(2) [1937] 1 K. B. 583.

right acquired in respect of which these payments are made is an easement within the meaning of the definition clause.

The next question is whether or not the payments are annual or periodical payments, and the further question remains, if so, are they payments in the nature of rent. It seems to me beyond dispute that these payments are periodical payments because they are payable half-yearly during the continuance of the demise, or at any rate so long as any coal is being worked under the demise. But they must be periodical payments in the nature of rent before they are caught; and it is pertinent to point out that the phrase "payment in the "nature of rent" must be construed in relation to the type of subject-matter in respect of which the payment in controversy falls to be made. The type of subject-matter in the present case is this particular type of "easement" within the meaning of this definition clause. We therefore start off with a subject-matter which, looked at from the strict point of view of law apart from the wording of this section, involves a payment which, if analysed, is a commutation of a claim for damages. So be it. But once the right is an easement within this highly artificial definition I cannot myself see how an annual payment made in respect of that easement can fail to be a payment in the nature of rent within the meaning of those words in this context. It is not a question of what the nature of rent is in vacuo; it is a question of what the words "payment in the nature of rent" mean in relation to this particular type of subject-matter. If Mr. Talbot had not argued the point with great ability and conciseness it could not really be contended, I should have thought, that these payments are not in the nature of rent.

The result, therefore, is that the appeal must be dismissed, and dismissed with costs.

DU PARCQ L.J. I agree.

SINGLETON J. I agree.

Appeal dismissed.
Leave was given to appeal to the House of Lords.

Solicitors for plaintiffs: *Andrew, Purves, Sutton & Creery, for Newman & Bond, Barnsley.*

Solicitor for defendants: *Solicitor of Inland Revenue.*

P. J. B.

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Apr. 20.

MIDDLESEX COUNTY COUNCIL *v.* KIVERSTEIN.

Local government—Hospital—Claim for expenses of treatment against deceased patient's estate—" Not being expenses recoverable from " any other source "—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 184, *sub-s.* 1.

By s. 184, sub-s. 1, of the Public Health Act, 1936, a county council shall recover the expenses of maintaining in their hospital a patient not suffering from an infectious disease either from the patient, from any person legally liable to maintain him, or from the patient's estate (if he is dead), " not being expenses recoverable " from any other source." By the proviso to the sub-section the council may by agreement with the governing body of any association or fund established for providing benefits for members or beneficiaries thereof, accept payment therefrom in lieu of recovering them in any of the ways set out in the sub-section.

A county council claimed expenses from the estate of a deceased patient, a married woman. The executor contended that they were recoverable from " [another] source," namely, the husband, under a contract by him implied by law to pay for necessaries supplied to his wife :—

Held, that the words " recoverable from any other source " referred to the sources mentioned in the proviso, and not to the husband's liability, and that, as there had been no such agreement as was mentioned in the proviso the council were entitled to adopt the remedy they had chosen.

APPEAL from Brentford county court.

Under s. 181 of the Public Health Act, 1936, the plaintiffs provided a hospital for sick persons in the county of Middlesex. In July, 1940, they admitted a Mrs. Black, a married woman, as a patient suffering from a non-infectious disease of which she died in October, 1940. She left a will of which the defendant was executor, and an estate of about 1200*l*. The plaintiffs claimed 74*l*. 16*s*. 1*d*. from the deceased's estate, being the cost of her maintenance in the hospital, the third alternative form of claim given by s. 184, sub-s. 1, of the Act (1). The county court judge held that the expenses could be recovered from Mrs. Black's husband under an implied contract to pay for necessaries, i.e. the hospital maintenance supplied to her, and that, therefore, they were "recoverable from [another] source" within the meaning of sub-s. 1, and gave judgment for the defendant. The plaintiffs appealed.

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(1) Public Health Act, 1936, s. 184, sub-s. 1 : " In the case of " a patient who has become an " inmate of an institution [which " by sub-s. 2 (*a*) includes a " hospital provided by a county " council], for the purpose of " receiving treatment for in" fectious disease, a county council " or local authority may, and in " the case of any other patient " maintained by them in an " institution shall, recover from " the patient, or from any person

Cartwright Sharp K.C. and *Crispin* for the plaintiffs. The words "recoverable from any other source" refer only to the "sources" mentioned in the proviso to sub-s. 1, or, perhaps, also to expenses recoverable under s. 36, sub-s. 2, of the Road Traffic Act, 1930, as amended by s. 33 of the Road and Rail Traffic Act, 1933, whereby such expenses can be recovered from the defendant in an accident claim. [He was stopped.]

W. A. L. Raeburn for the defendant. The husband was liable to maintain his wife under an implied contract made by her as his agent to pay for necessaries supplied to her, and these expenses were such necessaries. The plaintiffs, therefore, should have exhausted their remedy against him before proceeding against the wife's estate, as the expenses were "recoverable from [another] source." The remedy in s. 184, sub-s. 1, against "any person legally liable to maintain" her was not open to the plaintiffs as, under s. 14 of the Poor Law Act, 1930, the husband was not liable to maintain his wife unless she was a pauper, which she was not, nor at common law, except for necessaries as aforesaid.

MACKINNON L.J. Under s. 184, sub-s. 1, of the Public Health Act, 1936, the plaintiffs are under a duty to recover

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"legally liable to maintain him, "or from the patient's estate, if "he has died, any expenses "incurred by the council or "authority in providing for his "maintenance in the institution, "not being expenses recoverable "from any other source. . . . . "Provided that any such council "or authority may, by agreement "with the governing body of any "association or fund established "for the purpose of providing "benefits to members or other "beneficiaries thereof, accept from "the association or fund, in "respect of the expenses incurred "by the council or authority "in the maintenance of any "member or beneficiary of the "association or fund, payment "of such sums as may be provided by the agreement in lieu "of recovering the whole or any "part of the said expenses from, or "from the estate of, the member or "beneficiary, or from any person "legally liable to maintain him."

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MacKinnon L.J.

expenses for the maintenance of a sick person, and they are given power to recover them either from the patient, if he is alive, or from his estate, if he has died, or from any person legally liable to maintain him, provided that they are not "expenses recoverable from any other source." In this case, the patient having died, the plaintiffs adopted a course which seems to be plainly open to them, namely, to claim the expenses from the patient's estate. Prima facie it would be difficult to see how there could be any defence to that claim, but the ingenuity of the advocate who appeared in the county court for the defendant suggested an answer which I regret to say the judge accepted. That argument was that the claim against the patient's estate was excluded by the subsequent words "not being expenses recoverable from any "other source," these expenses being recoverable in contract against the husband of the deceased.

It is true that any person legally liable to maintain the patient is one of the sources mentioned in the substantive part of the section. The learned judge was persuaded that that did not include the husband of Mrs. Black, because the liability was said to be limited to the husband of a pauper and Mrs. Black was not a pauper. Therefore, it was said that in this case there was only one course open to the plaintiffs under the earlier part of the section—to recover against the patient's estate as she has died—but that recourse could not be had to the estate if the expenses could be recovered from another source and the plaintiffs were able to recover them from the husband. I cannot follow that reasoning, and I think it is clearly fallacious. The words seem to me to be as plain as any words can possibly be, that, when the patient has died, the expenses can be recovered from the patient's estate. The words of limitation, " not being expenses recoverable from any " other source," clearly are directed to the position contemplated by the proviso to s. 184, sub-s. 1, under which a county council may make agreements with associations or funds to which they will look for the recoupment of expenses incurred in regard to members thereof. Also, no doubt, the words would include the right conferred on a hospital by s. 36, sub-s. 2, of the Road Traffic Act, 1930 (as amended), to recover the expenses of caring for the victim of a road accident.

I do not, however, think it necessary to elaborate this. I am quite satisfied that there was no answer to the claim in the clear words of the section under which the patient's estate after her death is liable for the expenses of maintaining her. The appeal should, therefore, be allowed with costs.

LUXMOORE L.J. I agree.

GODDARD L.J. I agree.

Solicitor for plaintiff: *C. W. Radcliffe.*
Solicitors for defendant: *Spiro & Steele.*

W. L. L. B.

REX v. WEST MIDDLESEX ASSESSMENT COMMITTEE AND MIDDLESEX COUNTY VALUATION COMMITTEE.

1942
Apr. 20, 21.

Ex parte SOUTHALL RATING AUTHORITY.

Rates—Valuation list—Amendment—Reopening previous assessments—Powers of assessment committee.

An electricity supply company was the occupier of a hereditament extending into several rating areas. The consideration of several proposals for the amendment of the valuation list for the S. area made by the S. rating authority and objected to by the company was deferred pending the settlement of certain legal questions. Ultimately, a provisional agreement between the company and the county valuation committee provided for the making of an average assessment on the company in each of five years. On the consideration of the proposals and objections, the assessment committee approved the provisional agreement, in the mistaken belief that the S. rating authority would accept it. The S. rating authority, however, appealed to quarter sessions in respect of the last of the five years only, that being the only one in respect of which there was an outstanding proposal on which they had appeared before the assessment committee. Quarter sessions allowed the appeal and increased the company's assessment in S. for that year. The county valuation committee, on the ground that this put the S. rating authority in an unduly favourable position compared with the other authorities concerned, requested the assessment committee to reopen the assessments for the first four years of the five-year period comprised in the agreement:—

Held, that the wide general power given to assessment committees by the Union Assessment Committee Act, 1862, having been repealed and not re-enacted by the Rating and Valuation Act, 1925, the assessment committee could not of its own motion amend the valuation lists for years in respect of which no proposals were duly made under the Act of 1925, and that both they and the county valuation committee ought to be prohibited from proceeding on the request.

Veasey v. *Beardsley & Son, Ld.* (1924) 23 L. G. R. 118 and *Kingston Mill, Stockport, Ld.* v. *Owen* (1928) 27 L. G. R. 12, held inapplicable to cases under the Rating and Valuation Act, 1925, and not followed.

MOTION for order of prohibition.

The Metropolitan Electric Supply Company was the occupier of a hereditament extending into the areas of several rating authorities in the counties of Middlesex, Surrey and Buckingham, including the area of the borough of Southall in the West Middlesex Assessment Area, for which the Southall borough council were the rating authority. Apart from a determination by the assessment committee of certain proposals hereinafter mentioned, the rateable value of the Metropolitan Electric Supply Company's undertaking in Southall would have been as follows in the material years :—1934–5, 8516*l.*; 1935–6, 7830*l.*; 1936–7, 7830*l.*; 1937–8, 7830*l.*; 1938–9, 14,966.—total for five years 46,972*l.*, giving a yearly average of 9394*l.* The figure of 8516*l.* for 1934–5 was the result of a determination by the West Middlesex Assessment Committee of a proposal by the company dated September 3, 1934, to reduce the previous rateable value. That determination was not appealed against. Four subsequent proposals were made, in July, 1935, March, 1936, and March, 1939, by the rating authority to increase the assessment, and in March, 1939, by the company to reduce it, notice of objection being given by the other party in each case. The first two proposals were considered and approved by the assessment committee in 1936, the rateable value of the company's hereditament being increased first to 9502*l.*, and then to 10,500*l.*, subject to the consideration of the company's objections which was deferred pending the determination of certain legal questions as to the correct method of apportionment of the valuation of the company's ring trunk main. Those questions were determined by Macnaghten J. on December 21, 1938: see *Metropolitan Electric Supply Co., Ld.* v. *County Valuation Committee of Buckingham* (1). An appeal against the decision of Macnaghten J. was entered, but was withdrawn as the result of a settlement by the parties, following which a provisional agreement was made by the valuers for the county valuation committee and the company which provided for an average assessment for each of the five years 1934–5 to 1938–9 inclusive in each rating area. The agreement so far as Southall was concerned was based on an agreed calculation that the correct figures for the rateable value of the company's hereditaments ought to have been as follows :— 1934–5, 10,163*l.*; 1935–6, 7830*l.*; 1936–7, 7830*l.*; 1937–8, 7830*l.*; 1938–9, 14,966*l.*—total for five years 48,619*l.*, giving a yearly average of 9724*l.*, and the agreement provided that the assessment committee should be asked to amend the valuation list for each of the five years by inserting the average figure of 9724*l.*, although there were no outstanding proceedings in respect of some of these five years before the assessment committee. On October 18, 1940, this provisional agreement and the four adjourned proposals were considered by the West Middlesex Assessment Committee, which approved the provisional agreement on the assumption that Southall would, like the other rating authorities concerned, concur in it. Southall, however, appealed to quarter sessions in respect of the year 1938–9 only. Quarter sessions allowed the appeal and ordered the rateable value of 14,966*l.* to be inserted in the valuation list. The effect of this, according to the view of the county valuation committee was that Southall obtained an unfair proportion of the total rateable value of the company's hereditament in that, by taking into consideration, in arriving at the average, the figure of 14,966*l.* for 1938–9, they obtained an assessment for the previous four years of a higher figure than they would have been entitled to apart from the agreement and at the same time got for the year 1938–9 a higher assessment than the agreement would have given them. On the ground that this inequality could only be put right if the assessment committee reopened the question of the assessments for the first four years, the county valuation committee requested the assessment committee to do so, and to amend the valuation lists for the years 1934–5, 1935–6, 1936–7, and 1937–8. The rating authority moved to prohibit the county valuation committee and the assessment committee from proceeding on that request.

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(1) [1939] 1 K. B. 601.

Harold Williams for Southall Rating Authority. All the five years in question were dealt with by the assessment committee in 1940, and although the matter was then heard and determined illegally, in that rating by average assessments is not permissible, nevertheless it was heard and determined. The earlier illegality in 1936 in purporting to approve the proposals of the rating authority subject to a later consideration of the company's objections is not material, because it was not acted on. The assessment committee are not entitled to another attempt. By the Union Assessment Committee Act, 1862 (1), assessment committees were given much wider powers than they now possess under the Rating and Valuation Act, 1925. They could then alter the valuation list at any moment, not only on the application of any aggrieved person, but also on their own motion, by making a supplemental list, and there was no right of appeal, but they can only alter the value of a hereditament on a proposal in writing by a person aggrieved, which proposal the committee must hear and determine. Having heard and determined, the committee are functi officio with regard to that proposal, and the Act does not authorize them to rehear and determine either on their own motion or that of any other person. *Veasey* v. *Beardsley & Son, Ld.* (2) and *Kingston Mill, Stockport, Ld.* v.

(1) By the Union Assessment Committee Act, 1862, s. 26: "The "committee . . . . may from time "to time, where they see fit, upon "the application of any person "aggrieved by the valuation list "in force in any parish, or where "they themselves think the same "expedient, direct a new valuation "of all or any of the rateable "hereditaments in such parish, "and a new valuation list in substitution for such valuation list "as aforesaid, or a supplemental "list in substitution for any part "thereof or in addition thereto " . . . . ."

Sect. 26 was repealed by the Rating and Valuation Act, 1925. It is unnecessary to set out the substituted provisions verbatim, but s. 19 provides for the making of quinquennial valuation lists; s. 26 enables persons aggrieved by the incorrectness or unfairness of any matter in a draft list to lodge objections, which by s. 27, sub-s. 1, are to be considered by the assessment committee. By s. 27, sub-s. 2, the assessment committee are empowered, on their revision of the draft list, to make such alterations, insertions and corrections, whether for the purpose of meeting an objection or for any other reason, as they think proper. Sect. 28 provides for the final approval of the list after all objections have been heard and determined. Sect. 30 permits the assessment committee to correct any clerical or arithmetical error in the list at any time. Sect. 31 gives an appeal to quarter sessions to any party aggrieved, and s. 37 provides for the amendment of a current valuation list on a proposal in writing by any person aggrieved (including the county valuation committee and any local authority).

(2) (1924) 23 L. G R. 118.

Owen (1) both decided under the Union Assessment Committee Acts, have no authority in regard to the expressly limited powers of an assessment committee under the Act of 1925.

Montgomery K.C. and *Scott Henderson* for the assessment committee and the county valuation committee. The assessment committee are entitled to reopen the matter. Unless the Act of 1925 has altered the law in material respects, *Veasey* v. *Beardsley & Son, Ld.* (2) and *Kingston Mill, Stockport, Ld.* v. *Owen* (1) make it plain that, if an assessment committee have made a blunder, they can rehear and determine a matter according to law. Whatever hearing and determination there was previously in this case clearly was not a hearing and determination according to law. It is specifically admitted that the assessment committee acted illegally in adopting the average principle, but there is nothing in the Act of 1925 which turns the assessment committee into a judicial body whose decision once made cannot be revised: per Scott L.J. in *The King* v. *City of Westminster Assessment Committee. Ex parte Grosvenor House (Park Lane), Ld.* (3). Such alterations as were made by the Act of 1925 in the law as it existed under the Union Assessment Committee Acts, 1862 and 1864, were purely in matters of form. Sec. 26 of the Act of 1862 was omitted from the Act of 1925 probably because it was not of much value. The assessment committee here are not proposing of their own motion to alter the list. They say that there were objections and proposals made in 1935-36, and that they are entitled, on the authority of *Kingston Mill, Stockport, Ld.* v. *Owen* (1), to reopen the matter.

Squibb for the Metropolitan Electric Supply Co.

CHARLES J. The question for our determination is whether the assessment committee has power to reopen the assessments for 1934-38 and so to adjust the figures that fairness will be done between the rating authorities. To determine that question, one must inquire what powers the Acts of Parliament which now govern these matters have given to assessment committees, and what powers they have taken away. By s. 26 of the Union Assessment Committee Act, 1862, powers were given to assessment committees which were untrammelled by restriction. That was made abundantly clear in *Veasey* v. *Beardsley & Son, Ld.* (2) and *Kingston*

(1) (1928) 27 L. G. R. 12.
(2) 23 L. G. R. 118.
(3) [1941] 1 K. B. 53, 63.

Mill, Stockport, Ld. v. *Owen* (1). The assessment committee were not a judicial body but simply a body of persons appointed to do their best to ascertain details and match them together into a pattern of rates which would be fair as between the rating authority and the ratepayer.

The matters with which we have to deal to-day arose, not under the Union Assessment Committee Act, 1862, nor the Union Assessment Committee (Amendment) Act, 1864, but under the Rating and Valuation Act, 1925, and it is necessary to see whether, under that Act, the position of the assessment committee was allowed to remain, as to its powers and duties, what it had been under the Acts of 1862 and 1864. The first thing which one observes, on comparing the Acts, is that s. 26 of the Union Assessment Committee Act, 1862, is repealed and not re-enacted by the Act of 1925 by which the powers of assessment committees have been largely pruned. The general power under s. 26 of the Act of 1862 has been taken away and replaced by a long series of directions telling the committee exactly what they can do and what they cannot do. It is to be observed further that the express power in s. 30 of the Act of 1925 to " cause to be corrected any clerical "or arithmetical error in the valuation list" would be unnecessary if there remained to the committee the powers which were found in s. 26 of the Act of 1862. While I have said that *Veasey* v. *Beardsley & Son, Ld.* (2) and *Kingston Mill, Stockport, Ld.* v. *Owen* (1) were decided as one would expect at their respective dates, I myself very much doubt their validity as applying to the circumstances disclosed here under the Act of 1925.

It only remains for me to say that, in my view, the county valuation committee requested the West Middlesex Assessment Committee to do that which they had no power to do, and the assessment committee, having indicated that they are going to proceed to satisfy that request, ought to be prohibited from so doing. In my judgment, the rating authority's claim for relief succeeds, and the two orders of prohibition for which we are asked, against the Middlesex County Valuation Committee and the West Middlesex Assessment Committee, should be made.

LEWIS J. I agree.

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1) 27 L. G. R. 12.

(2) 23 L. G. R. 118.

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REX
v.
WEST
MIDDLESEX
ASSESSMENT
COMMITTEE
AND
MIDDLESEX
COUNTY
VALUATION
COMMITTEE.
SOUTHALL
RATING
AUTHORITY,
Ex parte.

OLIVER J. I agree.

Orders for prohibition made.

Solicitors for rating authority: *Sharpe, Pritchard & Co., for M. Lindsay Taylor, Town Clerk, Southall.*

Solicitors for county valuation committee and the assessment committee: *H. G. Greenwood, Ealing, and C. W. Radcliffe.*

Solicitors for Metropolitan Electric Supply Co., Ld.: *Sydney Morse & Co.*

J. W. H.

WATERLOW AND SONS, LIMITED *v.* SHOREDITCH ASSESSMENT COMMITTEE.

1942
Apr. 28.

Rates—Valuation—Emergency legislation—Air-raid works—Result of structural alterations reduction in gross value—Insertion of hereditament in supplemental list—Rating and Valuation (Air-Raid Works) Act, 1938 (1 & 2 *Geo.* 6, *c.* 65), *s.* 1, *sub-s.* 1 (*b*).

Occupiers of premises constructed an air-raid shelter therein with the result that the space available for their business was diminished and the gross value of the premises was reduced:—

Held, that, as the result of the structural alterations to the premises was to diminish and not to increase their rateable value, s. 1, sub-s. 1 (*b*), of the Rating and Valuation (Air-Raid Works) Act, 1938, did not apply and the occupiers were entitled to have the premises entered in the supplemental list under s. 46, sub-s. 1, of the Valuation (Metropolis) Act, 1869.

CASE stated by London quarter sessions.

Premises in the Shoreditch rating area which were occupied by Waterlow & Sons, Ld., appeared in the valuation list at a gross value of 5000*l.*, a net annual value of 4000*l.*, and a rateable value of 1000*l.* On November 20, 1940, the company appeared before the Shoreditch Assessment Committee, objected to the valuation list on the ground that the values therein were excessive and unfair, and claimed that the premises should be inserted in a supplemental list made in the year beginning April 6, 1940. The assessment committee refused the claim and the company appealed to quarter sessions who allowed the appeal, but stated this case. Before quarter sessions it was proved or admitted that the premises were altered during the twelve months ending April 5, 1940, by the construction therein of an air-raid shelter, which resulted in a reduction in the space available for the company's business, and a consequent reduction of 422*l.* in the annual rent which a tenant might reasonably be expected to give on the terms set out in the definition of "gross value" in s. 4 of the Valuation (Metropolis) Act, 1869. Quarter sessions were of opinion that the structural alterations and the reduction in the rent constituted an alteration in the matters stated in the valuation list within the meaning of s. 46, sub-s. 1, of the Act of 1869, and ordered the premises to be inserted in the supplemental list at a gross value of 4578*l.*, a net annual value of 3812*l.* and a rateable value of 953*l.* The assessment committee appealed.

Macaskie K.C. and *Squibb* for the assessment committee. It is admitted that, but for the provisions of s. 1, sub-s. 1, of the Rating and Valuation (Air-Raid Works) Act, 1938 (1), these premises ought to be entered in the supplemental list, but that sub-section says clearly that "no regard shall be "had . . . . (*b*) to any structural alterations . . . . made . . . . "solely" for protection against air raids, i.e., no regard shall be had thereto whether the result be increase or decrease in value. This shelter was made in accordance with statutory obligations under the Civil Defence Act, 1939, and the beneficial occupation of the whole building is vested in the company and is indivisible.

Harold Williams for the company. By s. 1, sub-s. 1 (*b*), of the Act of 1938, no regard is to be had to these structural alterations. It has been found as a fact that the value of the premises has been reduced by 422*l.*, which means the value of the premises rebus sic stantibus, i.e., without regard to the shelter works, as directed by the statute. Therefore, under ordinary rating law as contained in s. 46, sub-s. 1, of the Valuation (Metropolis) Act, 1869, these premises should be entered in the supplemental valuation list. The Act of 1938 is entitled "An Act to provide for relief "from rates in respect of air-raid protection works." The

(1) Rating and Valuation (Air-Raid Works) Act, 1938, s. 1, sub-s. 1: "In ascertaining under "the principal Act [the Valuation "(Metropolis) Act, 1869] the value "for rating purposes of a heredita-"ment, no regard shall be had " . . . . (*b*) to any structural "alterations or improvements to "the hereditament . . . . made at "any time after the hereditament "was first assessed, solely for the "purpose of affording such pro-"tection as aforesaid [protection "in the event of hostile attack "from the air]."

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WATERLOW & SONS, LD. *v.* SHOREDITCH ASSESSMENT COMMITTEE.

title of the Act may be looked at to ascertain its purpose: *Moon* v. *London County Council* (1) and *Fielden* v. *Morley Corporation* (2), but, if the Act were interpreted as contended for by the assessment committee, so far from relieving the company, it would make them pay rates in respect of a part of their premises which cannot be used for their business.

Macaskie K.C. replied.

VISCOUNT CALDECOTE C.J. There is one rule which has always to be borne in mind in the interpretation of statutes, and that is that it is the duty of the court so to interpret an Act as to give it the effect intended by the legislature. In my view, in passing the Rating and Valuation (Air-Raid Works) Act, 1938, Parliament intended to encourage occupiers of premises to provide air-raid shelters, and, to further that purpose, to protect an occupier who had spent considerable sums in providing shelter from having to pay rates on an increased rateable value. I have come to the conclusion that where the effect of making structural alterations so as to provide shelter is to render the rateable value less than it previously was, the ordinary law of rating applies, and the premises are to be assessed in their new condition.

This conclusion is supported by the provisions of s. 69 of the Civil Defence Act, 1939, which provides: "Section 1 "of the Rating and Valuation (Air-Raid Works) Act, 1938 "(which provides for the relief of air-raid protection works "from rates) shall, in relation to a hereditament forming part "of a building, have effect as if any structural alterations or "improvements made in the building . . . . for the purpose "of providing air-raid shelter were structural alterations or "improvements to the hereditament, and in ascertaining the "value for rating purposes of a hereditament under the "principal Act (as defined in the said section 1) no regard "shall be had to any increase in the rent thereof." So there, clearly, the intention is to give relief to an occupier in respect of an increase in the rent on which the premises would otherwise have to be assessed, and to add that relief to the other reliefs for which the Act of 1938 provides.

In my opinion, quarter sessions were right in the view which they took of the law, and this appeal fails.

HUMPHREYS J. I agree.

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(1) [1931] A. C. 151, 157.

(2) [1899] 1 Ch. 1.

CASSELS J. I agree.

Solicitor for assessment committee: *R. Cyril Ray.*
Solicitor for the company: *Paul Urban.*

W. L. L. B.

1942
Apr. 29.

CUMMINGS *v.* BRITISH FERMENTATION PRODUCTS, LIMITED.

Food and drugs—Sale with false label—Purchase of sample for analysis—Division of sample—One part handed to seller—Proceedings against previous seller—No part of sample delivered to previous seller—Whether condition precedent to institution of proceedings—Jurisdiction of magistrate—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 6, *sub-s.* 1; *s.* 70, *sub-s.* 1; *s.* 83, *sub-s.* 3.

An inspector, duly authorized under the Food and Drugs Act, 1938, bought a sample, with the intention of having it analysed, of a food called "Chiefegg" to which was attached a label in which the food was described as "egg substitute." The inspector complied with the provisions of s. 70, sub-s. 1, of the Food and Drugs Act, 1938, by dividing the sample into three parts, one part of which was delivered to the seller, one part sent to a public analyst to be analysed, and one part retained by the inspector for future comparison. Subsequently proceedings were commenced against the previous sellers of the food under s. 83, sub-s. 3, of the Act charging them with having sold the goods to the retailer with a false label. No fresh sample was taken of the food and no part of the original sample was delivered to the previous sellers. The magistrate held that he had no jurisdiction as compliance with the provisions of s. 70, sub-s. 1, was a condition precedent to the institution of proceedings under s. 6, sub-s. 1, and they had not been complied with in the present case so far as the previous sellers were concerned:—

Held, that as the sale was effected upon a purchase by the inspector with the intention of submitting the article to be analysed the case was covered by sub-s. 1 of s. 70, and not by sub-s. 2, which dealt with a person taking a sample of food while in transit or at the place of delivery, and that as the formalities required by sub-s. 1 had been complied with as regards the seller there was no necessity to comply with those formalities as regards the previous sellers.

CASE stated by the stipendiary magistrate for the city of Leeds.

The respondents, the British Fermentation Products, Ld., appeared before the stipendiary on September 15, 1941, upon a summons issued upon an information laid by the appellant, Joseph Cummings, a sanitary inspector for the city of Leeds, duly authorized by the food and drugs authority for the said city, charging the respondents that on July 28, 1941, they were guilty of an offence against Part I. of the Food and Drugs Act, 1938, in that they unlawfully did give with certain food sold by them called "Chiefegg" a label which was calculated to mislead as to the nature, substance and quality of the said food, in that it described the said food as an "egg "substitute" contrary to s. 6, sub-s. 1, and s. 79 of the said Act.

The information was heard by the stipendiary on September 15, 1941, when he dismissed it, but at the request of the appellant stated the following case:

The facts proved or admitted were as follows: The respondent company were the manufacturers and vendors to the Leeds Industrial Co-operative Society, Ld., of an article of food sold in tin containers called "Chiefegg." On July 28, 1941, the appellant inspector visited the Leeds Industrial Co-operative Society's stores in the city of Leeds and saw some tins of "Chiefegg" on the counter. He thereupon, with the intention of having it analysed by the public analyst, purchased a tin of "Chiefegg," paying 1*s.* 6*d.* for it. He then proceeded to empty it and divided it into three parts, leaving one part with the co-operative society, sending another part to the public analyst and retaining the third part, which was duly produced at the hearing. The said tin had been, some time previous to the visit of the said inspector, sold by the respondent company to the co-operative society. No part of the sample purchased by the inspector was sent to the respondent company under the provisions of s. 70, sub-s. 1 (1), of the said Act,

(1) Food and Drugs Act, 1938, s. 70, sub-s. 1: "A person purchasing a sample of any food "or drug with the intention of "submitting it to be analysed "by a public analyst, or taking a "sample of food on any premises "with the intention of submitting "it to be so analysed, shall, after "the purchase has been completed or the sample has been "taken, forthwith inform the "seller or his agent who sold the "sample, or, as the case may be, "the occupier of the premises "or the person for the time being "in charge thereof, of his intention to have the sample "analysed by the public analyst, "and shall then and there divide "it into three parts, each part "to be marked, and sealed or "fastened up, in such manner "as its nature will permit, and "shall—(*a*) if required so to do, "deliver one part to the seller "or his agent, or, as the case "may be, to the occupier of the "premises or the person for the "time being in charge thereof;

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CUMMINGS v. BRITISH FERMENTATION PRODUCTS, LD.

nor was any notice of his intention to have it analysed sent to them. The label on the tin containing the food so purchased stated (inter alia): "Chiefegg. Egg substitute. Has eggs "beaten. Every ounce equals six eggs—in effect. The "solution is now ready for use and is equivalent in its effect "to six whole eggs." The label further contained these words "A speciality of British Fermentation Products, Ld." and contained their address, "Chieftain Works, S.W.15."

An objection was taken by the respondent company that, as regards them, none of the requirements of s. 70 of the said Act had been satisfied, that the fulfilment of such requirements was a condition precedent and could not be waived: *Smart & Son* v. *Watts* (1), and that the stipendiary had no jurisdiction to hear the case.

The stipendiary was of opinion that, although the respondent company could have been brought in on a summons against the co-operative society in respect of the sale by the co-operative society to the appellant on July 28, under s. 83, sub-s. 1, of the said Act, and although other proceedings could have been instituted under s. 6, sub-s. 1, and other provisions of the said Act against the respondent company, as the appellant had elected to charge the respondent company under s. 83, sub-s. 3, of the said Act with the alleged original offence committed by the co-operative society in respect of the sale by them to the appellant on July 28 as alleged in the summons, and that as such sale was effected upon a purchase by the appellant inspector with the intention of submitting the

"(*b*) retain one part for future "comparison; and (*c*) if he thinks "fit to have an analysis made, "submit one part to the public "analyst: Provided that, in "relation to samples taken in "such circumstances as are mentioned in either of the two "next succeeding sub-sections, "the foregoing provisions with "respect to the giving of information and the manner of dealing "with samples shall have effect as "modified by these sub-sections."

Sub-sect. 2: "A person taking "a sample of any food while it "is in transit, or at the place of "delivery to the purchaser, consignee or consumer shall, if he "intends to submit it to be "analysed by a public analyst, "deal with it in the manner "provided by the preceding sub-section, except that he shall "retain the first-mentioned part "of the sample unless the name "and address of the consignor "appear on the container containing the article sampled, in "which case he shall forward that "part of the sample to the consignor by registered post or "otherwise, together with a notice "informing that person that he "intends to have part of the "sample analysed by the public "analyst."

(1) [1895] 1 Q. B. 219.

article to be analysed by the public analyst and with no other intention, the sale being a sale of that description, the provisions of s. 70 should have been complied with, in respect of the respondent company alleged in the summons to have committed the said offence. As they had not been complied with the stipendiary was of opinion that he had no jurisdiction to hear the case, and he dismissed the information.

The question for the court was whether or not such decision was correct in law.

Maurice Healy K.C. and *Vernon Gattie* for the appellant. Compliance with the provisions of s. 70, sub-s. 1, of the Food and Drugs Act, 1938, is not a condition precedent to the institution of proceedings under s. 6, sub-s. 1, of the Act where such proceedings are instituted not against the seller of the article, but against the person who had supplied the article to the seller. Sect. 70 only provides for the delivery of one-third part of the sample to the seller. There is no provision in the section for the delivery of any part of the sample to a previous vendor of the article. The facts in the present case are very similar to those in *Twynham* v. *Badcock* (1).

Linton Thorp K.C. and *Sebag Shaw* for the respondents. The decision in *Twynham* v. *Badcock* (1) led to an alteration in the law which has enabled the respondent to take this point. Avory J. pointed out in that case the hardship upon a wholesaler where there was a delay in the institution of proceedings and when he did not get a sample. Sub-sect. 2 of s. 70 of the Act of 1938 was enacted to remove this hardship. In the present case the name and address of the consignor appeared on the label and therefore there was an absolute obligation on the person taking the sample to send part of the sample to that address. That obligation arises when the sample of food is taken " while it is in transit or at the place "of delivery to the purchaser." " Transit " is defined in s. 100 as including " all stages of transit from the . . . "place of manufacture or other source of origin to the "consumer." In the present case, the place of delivery was the shop of the co-operative society.

Maurice Healy K.C. in reply. In this case there was a purchase of a sample and not a taking of a sample, and therefore the case is covered by the provisions of sub-s. 1 of s. 70 and not by sub-s. 2.

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(1) [1932] 2 K. B. 549.

VISCOUNT CALDECOTE C.J. It appears from the special case that the proceedings against the respondents were taken under s. 83, sub-s. 3, of the Act. The vendors of this article of food called "Chiefegg" were the Leeds Industrial Co-operative Society, Ld., but the appellant inspector, exercising the powers given by that sub-section, took proceedings not against the Leeds Industrial Co-operative Society but against the respondent company who were vendors to the co-operative society and were the manufacturers of the article. The next fact to be stated is that this was a case of a purchase of a sample of food by a person with the intention of submitting it to be analysed by a public analyst. That fact is found in para. 8 of the case where it is stated that the appellant inspector saw some tins of "Chiefegg" on the counter at the co-operative society's retail shop. The case then proceeds: "He thereupon, with the intention of having "it analysed by the public analyst, purchased a tin of "'Chiefegg,' paying 1*s.* 6*d.* for it. He then proceeded to "empty it and divided it into three parts, leaving one part "with the co-operative society, sending another part to the "public analyst and retaining the third part, which was duly "produced at the hearing."

That procedure was as between the appellant inspector and the co-operative society from whom he purchased the sample of food with the intention of having it analysed. The learned magistrate in para. 15 of the special case bases his decision upon this fact which I have been mentioning in these words: "As such sale was effected upon a purchase by "the appellant inspector with the intention of submitting the "article to be analysed by the public analyst and with no "other intention, the sale being a sale of that description." That finding in the case makes it impossible, in my judgment, to bring this case under sub-s. 2 of s. 70. The two sub-sections deal with two different sets of circumstances. The first sub-section deals with the case of a person purchasing a sample of food with the intention of submitting it to be analysed. Sub-sect. 2 deals with the case of a person taking a sample of food while it is in transit or at the place of delivery. It is a distinction between purchasing with the intention of procuring an analysis and a taking of a sample in certain circumstances with a similar intention. The powers of sampling are to be found in s. 68 of the Act and sub-s. 3 provides: "A sampling officer may take samples of (*a*) any "butter or cheese" and then by sub-para. (*b*) "any food or "substance" of particular descriptions. Therefore, this case has to be dealt with as one to which the provisions of sub-s. 1 of s. 70 are applicable. There is no finding in the case which brings in sub-s. 2.

What the respondents complained of was that they had not had the advantage of having a portion of the sample which was taken given to them, and everyone must appreciate the desire of this company or any other company which is charged with an offence under the Food and Drugs Act of having this advantage. But this case is not to be decided, any more than the case of *Twynham* v. *Badcock* (1) was decided, on the ground of hardship. The question is whether the Act of Parliament requires on the facts of a case like this that the person proceeded against must receive a sample under the only provisions, so far as I am aware, which are said to require it, namely, s. 70 of the Act. We have been referred to the case of *Twynham* v. *Badcock* (1). Parliament has altered the law since that case was decided. It is unnecessary for me to go through the facts of the case. It is sufficient to say that in that case, after a man, who was the seller of certain food, had been convicted of the sale of that food to the prejudice of the purchaser, another person was prosecuted under different provisions for having neglected to obey certain regulations, and his complaint was that the formalities prescribed by the Act of 1928 had not been complied with. Avory J., in the course of the argument (2), asked the question: "Where is the difference between the present "case and a case where a warranty has been given? When "proceedings are taken against the person giving the warranty "no fresh analysis is necessary." In his judgment Lord Hewart C.J. said this (3): "Now it is not denied on behalf "of the appellant that the taking of a sample, division of the "sample, and the making of an analysis are necessary. What "is denied is that where the taking of a sample, the division "of the sample, and the making of an analysis have taken "place as between the purchaser and the retailer, they must "be repeated after some interval of time when the inspector "comes to deal with the wholesaler. In my opinion, there is "no warrant for the contrary argument." I will read one more passage, this time from Avory J.'s judgment (4): "It is not

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(1) [1932] 2 K. B. 549.
(2) Ibid. 556.
(3) Ibid. 559.
(4) Ibid. 561.

"a case of a person purchasing an article with the intention of "submitting it to analysis. It is a case where an article has "already been purchased with the intention of submitting it to "analysis, and under art. 7 of the regulations it is proposed "to take proceedings against a previous seller of that article."

The reason I read those passages is not because I think *Twynham* v. *Badcock* (1) has decided the question which we have to decide, but to show that the case gave rise to an admitted hardship on the basis of the decision of the Divisional Court, but none the less the decision was what appears from the judgments in the case. It is pointed out there, and indeed it was so decided, that although a certain procedure was required to be followed in the case of a purchase with the intention of submitting the article to analysis, it was not necessary to show that that procedure had been followed in the case of a person who was charged with a different offence from the offence which was charged against the immediate seller. It was a case of hardship, but the law did not require the formalities to be gone through in the case of the second man who was charged, as well as in the case of the man who was charged in the first instance. In this case the learned magistrate's opinion is this, reading the words which I have already read: " That as such sale was effected upon a purchase "by the appellant inspector with the intention of submitting "the article to be analysed by the public analyst and with no "other intention, the sale being a sale of that description, "the provisions of s. 70 should have been complied with in "respect of the respondent company alleged in the summons "to have committed the said offence." That seems to me to contain a fallacy, with all respect to the learned magistrate. The provisions of s. 70 were complied with in respect of the only persons who are brought into the matter by those provisions. When he says they should have been complied with in respect of the respondent company, the answer which I think must be made to that statement is that at the time the sample was taken there was no intention of prosecuting the persons who were ultimately proceeded against under s. 83, sub-s. 3, of the Act.

The case has not been an easy one and I do not pretend that at some stages in the argument I saw the way to form a clear opinion upon it, but having listened to the two arguments and having read para. 15, in which the learned

(1) [1932] 2 K. B. 549.

magistrate states his opinion, I have come to the conclusion that hardship or no hardship (and I think I do see the hardship) there is no necessity to comply with the formalities of s. 70, sub-s. 1, in the case of those who were ultimately prosecuted, namely, the respondents.

For these reasons I think the learned magistrate arrived at a decision which was not correct in law and the appeal must be allowed.

HUMPHREYS J. I agree with the conclusion proposed by my Lord that the appeal should be allowed.

CASSELS J. I agree. The case should be remitted to the learned magistrate with the intimation that he had jurisdiction.

Appeal allowed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for O. A. Radley, Town Clerk, Leeds.*

Solicitors for respondents: *A. Kramer & Co.*

R. F. S.

HERMAN JENNINGS AND COMPANY, LIMITED v. SLATCHER.

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May 1.

Food and drugs—Warranty—False label—Sample—Prosecution for giving false warranty—Extent of warranty—Time for taking proceedings—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *ss.* 6, *sub-s.* 1; *s.* 80, *sub-s.* 1 (*a*) *and* (*b*); *s.* 85, *sub-s.* 2.

The appellants, who were manufacturers, sold to B. & Co., wholesalers, forty gross of Prem Egga, and gave a warranty in writing that "All the goods in this invoice are guaranteed to be of "the nature, substance and quality described, and to comply "with the provisions of the Sale of Food and Drugs Act, and all "other statutory requirements or regulations relating to the "sale of food." Each packet of Prem Egga bore a label stating (inter alia) "Prem Egga equal to three eggs for 3½*d.*" B. & Co. sold some of the goods to M., a retailer, from whom the respondent purchased a sample for analysis, which showed that Prem Egga contained no egg-constituents, and that the label was therefore false and misleading. More than twenty-eight days having elapsed from the taking of the sample, no proceedings could be taken under s. 6 of the Food and Drugs Act, 1938, for affixing a

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false label, but the appellants were convicted under s. 85, sub-s. 2, of the Act for giving a false warranty :—

Held, that they were rightly convicted. The mere taking of a sample in the course of the proceedings did not bring the case within s. 80, sub-s. 1 (*a*), of the Act, and the only time limit applicable was twelve months under s. 80, sub-s. 1 (*b*). No dual time limit was created by s. 80. The warranty must be taken to include both the goods and the label under which they were sold.

Cook v. *White* [1896] 1 Q. B. 284 applied.

CASE stated by Oxfordshire justices.

On September 23, 1941, an information was preferred by the respondent William John Daniel Slatcher, an inspector of weights and measures, under the Food and Drugs Act, 1938 (hereinafter called "the Act"), against Herman Jennings and Co., Ld., the appellants, for that they, on April 7, 1941, at Bampton, in the county of Oxford, unlawfully gave in respect of an article of food, to wit, Prem Egga, sold by them to H. H. & S. Budgett & Co., Ld., a false warranty in writing contrary to s. 85, sub-s. 2, of the Act (1). The justices convicted the appellants, and fined them 10*l.* and costs.

The following facts were proved or admitted. The appellants, on April 7, 1941, sold to H. H. & S. Budgett & Co., Ld., forty gross of Prem Egga. A warranty in writing given with the goods stated that "All the goods in this invoice

(1) By the Food and Drugs Act, 1938, s. 6, sub-s. 1: "A "person who gives with any food "or drug sold by him a label . . . . "which falsely describes that food "or drug, or is otherwise calculated to mislead as to its "nature, substance or quality, "shall be guilty of an offence, "unless he proves that he did "not know, and could not "with reasonable diligence have "ascertained, that the label was of "such a character as aforesaid."

Sect. 80, sub-s. 1: "Subject "to the provisions of this Act, "all offences under this Act and "regulations and byelaws made "thereunder may be prosecuted "under the Summary Jurisdiction Acts: Provided that—(*a*) "where a sample has been procured under this Act, no "prosecution in respect of the "article sampled shall be commenced after the expiration of "twenty-eight days from the "time when the sample was "procured . . . . (*b*) the time "within which proceedings may "be commenced under s. 85 of this "Act in respect of the giving "of a false warranty shall be "twelve months instead of six "months."

Sect. 85, sub-s. 2: "A person "who, in respect of any food or "drug sold by him, gives to the "purchaser a false warranty in "writing, shall be guilty of an "offence, unless he proves that "when he gave the warranty "he had reason to believe that "the statements or description "contained therein were accurate."

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"are guaranteed to be of the nature, substance and quality "described, and to comply with the provisions of the Sale "of Food and Drugs Act, and all other statutory requirements "or regulations relating to the sale of food." On April 17, 1941, H. H. & S. Budgett & Co., Ld., sold four dozen of these goods to W. Mathews, a grocer, of Bampton, under the following warranty in writing: "The goods included in this "invoice are guaranteed to comply with the Food and Drugs "Acts and all other statutory requirements or regulations "relating to the sale of food at present in force."

On June 12, 1941, the respondent purchased a sample, namely, twelve packets of Prem Egga from Mathews, and complied with the statutory formalities on the taking of a sample for analysis. The sample was analysed, and the public analyst's certificate, dated July 17, certified that "it is a "sample of dyed self-raising flour containing no egg." After setting out the constituents found, the report continued: "This "material, being devoid of egg constituents, is not equal to "three eggs, as stated on the label of the packet. The state-"ment is therefore false, and one calculated to mislead the "purchaser."

The label on the packet of Prem Egga infringed s. 6 of the Act, the label bearing (inter alia) the following words: "'Prem Egga' "equal to 3 eggs for 3½*d.*—Packed by Herman Jennings "and Co., Ld." After instructions for use it was stated that "1 teaspoon of Prem Egga and 2 tablespoons of water equals "1 egg." After the purchase by the respondent, the appellants withdrew all the labels with this wording, and substituted labels with a revised description.

The respondent did not receive the analyst's certificate in time to institute proceedings under s. 6 of the Act. The goods called "Prem Egga the Perfect Egg Substitute" were not of the nature, substance and quality described, and did not comply with the provisions of the Act.

The justices were of opinion that the appellants had given a false warranty in writing; that the proceedings were well founded under s. 85, sub-s. 2, of the Act, and were taken within the time prescribed by s. 80, sub-s. 1 (*b*), and that the period of twenty-eight days did not apply to proceedings under s. 85 in respect of the giving of a false warranty. The justices' attention was called to *Cook* v. *White* (1).

The justices accordingly convicted the appellants.

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(1) [1896] 1 Q. B. 284.

N. H. Lever for the appellants. The label has been found to be false, and I am bound by that, but that is an offence under s. 6, not s. 85, and the proceedings have been taken under the wrong section. The warranty was a warranty of the goods, not of the label, and it was false only as regards the label. It is not suggested that the goods were impure or unwholesome, but merely that they were misdescribed.

But the main contention is that the proceedings were out of time. Sect. 80, sub-s. 1, must be read as a whole and the effect is to create a double time limit. First, the Summary Jurisdiction Acts apply.

[HUMPHREYS J. Sect. 11 of the Summary Jurisdiction Act, 1848, applies, in terms, only where no other time is fixed.]

True, but the twenty-eight days from the taking of the sample runs from a different date from the six months under the Summary Jurisdiction Act, and is not inconsistent with it. A prosecution, it is submitted, to be in time where a sample has been taken must be *both* within twenty-eight days from the taking of the sample *and* within six or twelve months (in the case of a false warranty) from the commission of the offence. In *Whitaker* v. *Pomfret Bros.* (1), the six months' limit under s. 11 of the Summary Jurisdiction Act was held applicable.

T. R. Fitzwalter Butler for the respondent was only called upon on the first point. The word "described" in the warranty must mean not only "described in the invoice," but described in any other accompanying document. Moreover, the goods were warranted to comply with the Act. The Act prohibits the use of a false label, and, therefore, if the label was false, the Act was not complied with, and the warranty was false. [He was stopped.]

VISCOUNT CALDECOTE C.J. Of the two points taken for the appellants, the main one is a question of time—whether s. 80, sub-s. 1 (*a*), applies to this case. It has been strenuously argued that there is a double time limit for proceedings under s. 85 in respect of the giving of a false warranty, and that proceedings must be commenced not only (under para. (*b*)) within twelve months of the time when the offence was committed, but also, if a sample has been taken, within twenty-eight days from the date when the sample was procured. I

(1) [1902] 1 K. B. 661.

have come to the conclusion that para. (*a*) deals only with the case of a prosecution of the person from whom the article which was sampled and analysed was procured. It seems to me that the fair reading of the paragraph leads to that conclusion, and that it does not mean that in every case where a sample has in fact been taken proceedings for which the analysis of that sample are not really necessary must be taken within twenty-eight days of the taking of the sample. I think that paragraph is intended to deal, and does deal, as, indeed, the words themselves say, only with proceedings taken "in respect of the article" procured for analysis. Where proceedings are taken, not in respect of the sample, e.g., under s. 6, but in respect of the different offence of giving a false warranty under s. 85, sub-s. 2, those proceedings are not within s. 80, sub-s. 1 (*a*), even though it was from the goods falsely warranted that a sample was later taken.

I am fortified in that conclusion by what Lindley L.J. said in *Cook* v. *White* (1), and I have not heard anything in this case to alter my opinion that he really decided this question. He said (2): "There was no sale by the warrantor for test "purposes at all, and it is difficult to see how the provision "as to twenty-eight days could apply in such a case. Of "course, if the milk had been bought in the first instance "from the original vendor for test purposes, the period of "twenty-eight days might and would have run from the "time of such sale. But in such a case as this, where the "milk was bought first of all with a warranty and where "subsequently there was a sale for test purposes, and then a "summons was issued against the original vendor for giving a "false warranty, it would be absurd to require that the "summons should be served within twenty-eight days of the "original sale." That judgment was based on slightly different provisions from those with which I am now dealing, but I think the reasoning applies just as much to this case as it did to the Act then in force. Fortified, therefore, as I am by that judgment of Lindley L.J. and also by the judgment of Kay L.J. in *Cook* v. *White* (1), I think that s. 80, sub-s. 1 (*a*), does not apply to this case, and that as the proceedings were commenced within the twelve months specified in para. (*b*) from the time when the matter of complaint arose, they were in time.

But it was also argued for the appellants that no offence

(1) [1896] 1 Q. B. 284.

(2) Ibid. 285.

was proved under s. 85 of the Act at all. I think the short answer to that point is that reading the words of the warranty in their natural sense they are a warranty that these goods were of the nature, substance and quality described on the label, namely, " Prem Egga. Equal to three eggs for "3½*d*.," or, to take another part of the label, " One teaspoon "of Prem Egga and two tablespoons of water equals one egg." I think that the justices were right in coming to the conclusion that the warranty was broken by the goods not being of that nature, substance and quality. Mr. Lever argued that the warranty only referred to the description of the goods contained on the face of the invoice. I do not think the justices took that view, and I see no reason why they should. Looking at the matter as one of substance, there is no doubt that the combined effect of the warranty and of the label attached to the goods, to which the warranty also applied, was to make a false representation (which was a false warranty within the Act) that these goods were something different from that which, in fact, they were. There is no getting away from that fact, and although this court would have to give effect to an argument which was well-founded technically, whatever effect it might have in allowing a guilty person to escape punishment, where, as in this case, the technicality is not well-founded, it is some satisfaction to me to think that I am doing substantial justice by the conclusion which I have reached. The fact that this label has been withdrawn shows, as indeed is conceded, that an offence has been committed, but it is said that it is only an offence under s. 6 of the Act. The justices came to the conclusion that it was an offence under s. 85. I think they were right, or at least justified, in that conclusion and that the appeal should be dismissed.

HUMPHREYS J. I am of the same opinion. I think that the appellants' argument on the question of limitation of time has proceeded on two separate and complete fallacies. The first is that a section in an Act of Parliament applying the provisions of the Summary Jurisdiction Act, 1848, commonly known as Jervis's Act, necessarily brings into operation the time limit of six months under s. 11 of that Act, which it does not. The second is that there is such a thing as a dual limitation of time for a particular prosecution, and that it is possible to say that the prosecution must be commenced within twenty-eight days and also within twelve months, which seems to me an absurdity. Jervis's Act was passed to deal with prosecutions for summary offences under statutes which themselves did not make any limitation of time. Sect. 11 provides: "In all cases where no time is already "or shall hereafter be specially limited for making any such "complaint or laying any such information in the Act or Acts "of Parliament relating to each particular case, such complaint "shall be made and such information shall be laid within "six calendar months from the time when the matter of "such complaint or information respectively arose." It is plain from the words of that section that it has no application to a case where the Act of Parliament creating the offence has itself specially limited the time for making the complaint or laying the information. That was recognized—one hopes it has always been recognized by lawyers—as far back as 1896, for no one in the argument in *Cook* v. *White* (1) suggested that s. 11 of Jervis's Act applied to a prosecution for giving a false warranty under the Sale of Food and Drugs Act. In that case the vendor of the milk to the inspector having successfully established the defence that he bought the milk with a warranty and sold it in the same condition in which he received it, the giver of the false warranty was summoned, and the argument was that the twenty-eight days' limit applied to that prosecution. If the twenty-eight days' limit did not apply, it was not even suggested that the six months under Jervis's Act applied, because the Act had limited a time, and had gone on to provide that, if the twenty-eight days did not apply, then the proceedings must be commenced within a reasonable time. The Act, therefore, having provided for all contingencies—twenty-eight days in some cases, and a reasonable time in all others—there was no room for s. 11 of the Summary Jurisdiction Act, 1848, and it was never mentioned in that case, in which the court held that it was sufficient if proceedings were taken against the warrantor within a reasonable time. I entirely agree with my Lord that the reasoning of that case is really conclusive of the present case. After that case, the law was altered, and the section providing for "a "reasonable time" was repealed, and replaced by a section which retained the twenty-eight days' limit for all the offences to which it applied, but provided that for other offences, including the giving of false warranties, the Summary

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(1) [1896] 1 Q. B. 284.

Jurisdiction Acts should apply. Under that section, s. 11 of Jervis's Act did apply, because the statute itself fixed no time for those proceedings, and in *Whitaker* v. *Pomfret Bros.* (1), the court held that the six months' limit applied. But in this case we have to deal with a section in which the words are as plain as the English language can make them, because a distinction is drawn between prosecutions in respect of an article sampled, and the obviously quite different offence of giving a false warranty. That has nothing to do with the taking of any sample at all, and while it is provided that the old twenty-eight days' limit shall continue to apply to prosecutions under the Act in respect of the article sampled, the Act in terms lays down that for the offence of giving a false warranty the original six months under the Summary Jurisdiction Act shall be enlarged to twelve months. I cannot conceive anything clearer than the language of that section.

As to the other point which has been argued, my Lord has covered the whole ground, and I need add nothing except that I agree not only with the judgment but with the reasons given for it.

CASSELS J. I agree, for the reasons given by both my Lords. Retailers are entitled to the protection of the Food and Drugs Act, as well as other members of the public. In these days of proprietary articles, over which the retailer has little or no control, it is not surprising that a warranty should be given by the manufacturer to the wholesaler on his taking a large consignment, in this case forty gross, and that the wholesaler should pass that warranty on to the retailer. The retailer is naturally concerned to know, when he handles a proprietary article, that he runs no unnecessary risk of prosecution for non-compliance with the Act.

In this case a false label was placed on the goods, and a false warranty had therefore been given. The appellants were prosecuted under s. 85, sub-s. 2, and the limit of time applicable was twelve months under s. 80, sub-s. 1 (*b*). The mere fact that a sample had been taken did not make this a prosecution " in respect of the article sampled " so as to bring into operation s. 80, sub-s. 1 (*a*). It is not a defence to a prosecution for giving a false warranty for the defendant to say that a sample was taken and the proceedings were

(1) [1902] 1 K. B. 661.

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not commenced within twenty-eight days. I am satisfied that the prosecution have discharged the onus upon them in that they proved (1.) that the warranty had been given; (2.) that it was in respect of food sold; and (3.) that it was false. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Hyman Stone & Co.*

Solicitors for respondent: *Church, Adams, Tatham & Co., for Challenor & Son, Oxford.*

J. W. H.

MURRAY *v.* PARKES.

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Mar. 18, 19, 20, 31.

Alien—Nationality—Irishman—British subject—Suggested loss of British nationality—Citizen of Eire—Liability under National Service (Armed Forces) Act, 1939*—British Nationality and Status of Aliens Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 17), *s.* 1, *sub-s.* 1 (*a*)*—Irish Free State (Agreement) Act,* 1922 (12 *Geo.* 5, *c.* 4)*—Irish Free State Constitution Act,* 1922 (*sess.* 2) (13 *Geo.* 5, *c.* 1)*—Statute of Westminster,* 1931 (22 *Geo.* 5, *c.* 4), *s.* 2*—Constitution of Ireland,* 1937 (*Irish Act*), *arts.* 4, 5, 6, 9*—Eire (Confirmation of Agreements) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 25), *first sch.—National Service (Armed Forces) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 81), *ss.* 1, 3.

The appellant, who was born in 1908 in that part of Ireland now known as Eire, but who had resided in England since 1934, claimed that he was not liable to be called up for service in the armed forces of the Crown under the National Service (Armed Forces) Act, 1939, on the ground that he was not a British subject inasmuch as under the Statute of Westminster, 1931, a Dominion had the right to secede, and the Irish Free State had, by the Constitution of Ireland, 1937, seceded, and thereby become a sovereign independent state, and that independence was acknowledged by the United Kingdom of Great Britain and Ireland by passing the Eire (Confirmation of Agreements) Act, 1938, with the result that the appellant, who had an Irish domicil, had ceased to be a British subject and had become a citizen of Eire:—

Held, that the appellant was a natural-born British subject by virtue of s. 1, sub-s. 1, of the British Nationality and Status of Aliens Act, 1914, he having been born within His Majesty's Dominions, and that he had not been deprived of that status by the legislation which made him an Irish citizen, and that even if the contention that Eire had seceded were correct, the appellant had not satisfied the onus cast upon him by s. 11 of the National Service Act, 1941, of showing that he was not a British subject inasmuch as he had continued to reside in England down to the present time.

Per Viscount Caldecote C.J. The removal by the Statute of Westminster in 1931 of any restriction upon the power of the legislature of the Irish Free State to pass legislation, whether repugnant or not to an Imperial Act, did not either expressly or by implication provide for any right to secede from the British Commonwealth of Nations. Nor at any time had it ever been declared in terms by the Government of Eire, that the so-called right to secede had in fact been exercised.

CASE stated by justices for the city of Leicester.

The following short statement of facts is taken from the judgment of the Lord Chief Justice.

The appellant, Michael Murray, was charged under s. 3, sub-s. 4, of the National Service (Armed Forces) Act, 1939, with failing to submit himself to medical examination by a medical board at the Medical Board Centre at the Drill Hall, Leicester, on May 7, 1941, as required by a notice duly served on him under sub-s. 1 of that section. The appellant by way of justifying his refusal claimed to be at all material times a citizen of the Irish Free State, or Eire, and not a British subject.

The appellant was born on December 23, 1908, within His Majesty's dominions and allegiance, in that part of Ireland which is now known as Eire. He came to England in 1934 and had resided in England continually up to the present time. He neither owned nor was the tenant of any property in Eire. He was the tenant of a house in the county of Leicester. He intended at some future date to make a home in Eire and on October 15, 1941, applied for a permit to return to Eire.

The justices, after stating that under s. 11 of the National Service Act, 1941, the onus of proving that the appellant was not a British subject lay upon him, found that he was born a British subject and that he had not satisfied them that there was such a break of the common tie of allegiance between the citizens of Eire and the Crown as would make the appellant an alien and that he remained a British subject. They further found that he was ordinarily resident in Great Britain and was subject to the National Service Acts, 1939–41. They accordingly found him guilty of the offence charged and fined him 1*l*.

Serjeant Sullivan K.C. and *I. F. Reuben* for the appellant. The appellant is not a British subject and therefore is not liable to be called upon to submit to medical examination.

Up to the passing of the Irish Free State (Agreement) Act, 1922, and the Irish Free State Constitution Act, 1922, there is no trace of the destruction of the authority of the Crown in Ireland. But by s. 2, sub-s. 2, of the Statute of Westminster no law made by a Dominion, which the Irish Free State is by s. 1, shall be void on the ground that it is repugnant to the law of England. Then began a process of whittling away the Constitution of the Irish Free State, e.g., in the abolition of the oath of allegiance by the Irish Act, the Free State Constitution (Removal of Oath) Act, 1933, and the Irish Act, the Constitution (Amendment No. 22), 1933, abolishing the appeal to the Privy Council: see *Moore* v. *Attorney-General for the Irish Free State* (1). Then it was provided by art. 5 of the Constitution of Ireland which came into force on December 29, 1937, that "Ireland is a sovereign, independent, democratic "state," and by art. 4 "The name of the state is Eire, or, "in the English language, Ireland." In that constitution there is no mention of the King. Henceforth the Irish Free State became a new state under a new name, Eire. The Statute of Westminster prevented that from being illegal, for the statute gave the right to secede. In that state of things was passed by the British Parliament the Eire (Confirmation of Agreement) Act, 1938, whereby it was enacted by s. 1 that the Free State should be known as Eire and that certain agreements should be confirmed. That was an agreement with Eire, the "sovereign, independent, democratic state" which did not by its constitution acknowledge the King, and, whether inadvertently or not—and it is not material—acknowledged the independence of Eire. Thereby the British Government ceded the territory of Eire, and that cession involved cession of the allegiance of its inhabitants, who were no longer to be considered subjects of the King: *Doe d. Thomas* v. *Acklam* (2). [*Labrador Co.* v. *Reg.* (3) was also referred to.]

Sir Donald Somervell A.-G. and *Arthian Davies* for the Crown. The onus of showing that he is not a British subject is on the applicant—s. 11 of the National Service Act, 1941. The question is whether by English law he is a British subject, and in an English court it is irrelevant to say that by the law of another country he is a national of that country. It is common ground that the applicant was born a natural-born British subject. The British Nationality and Status of

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(1) [1935] A. C. 484.

(2) (1824) 2 B. & C. 779.

(3) [1893] A. C. 104.

Aliens Act, 1914, by ss. 13–16, deals with loss of British nationality, and it is an exhaustive code. Here there has been no voluntary naturalization under a foreign state under s. 13, or a declaration under s. 14. There is nothing inconsistent with British nationality in the applicant being also a citizen of Eire. The Statute of Westminster did not give the right to secede, and the constitution of Eire if intended to be an act of secession had not that effect, because it was a unilateral act which would require the assent of Great Britain and probably that of the other Dominions. The Statute of Westminster only gives statutory effect to the position of Eire as a Dominion of the Crown. It only dealt with the legislative powers of Colonial Parliaments and put an end to the application to the Dominions of British laws. There is no provision in the Act as to nationality. No implication of recognition of independence is to be drawn from the Act of 1938, e.g., the analogy of Irish Free State (Agreement) Act, 1922. The fact that s. 1 of that Act states that the Irish Free State shall be called Eire is conclusive in favour of the Crown. If the Act was the recognition of Eire as a foreign state what was the object of enacting that it should be called Eire?

The appellant was admitted into this country as a British subject and has not been subjected to the disabilities of aliens.

Serjeant Sullivan in reply. A man's allegiance is to that country where he is domiciled, and it is found the applicant intended eventually to return to Eire.

Cur. adv. vult.

1942. Mar. 31. The following judgments were read.

VISCOUNT CALDECOTE C.J. The question which we have to consider in this case, which is an appeal by way of case stated, appears at first sight to be a simple one, namely, whether the appellant is a British citizen. In order to answer that question we have been invited to decide questions of far-reaching importance and worthy of consideration by the highest tribunal. This court, however, is a final court so far as the present proceedings are concerned, and for that reason it seems to me desirable that my observations on those questions should go no whit further than is necessary to decide the particular question raised by this appeal.

It is plain that unless the appellant was a British subject at the time of the notice served upon him to submit himself

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to medical examination, he was not liable to be served with the notice. Counsel for the appellant, taking the facts as found in the special case, put the case for the appellant in this way, stated shortly. He said, first, that by virtue of legislation of the Irish Free State passed in 1937 in exercise of the powers conceded by the Statute of Westminster, and providing a constitution for the former Irish Free State, thenceforward to be called Eire, Eire became separated from the British Commonwealth of Nations and in particular from the United Kingdom of Great Britain and Ireland. The next step in his argument was that the United Kingdom government, by entering into the agreements with Eire which were scheduled to the Eire (Confirmation of Agreements) Act, 1938, recognized the breach between Eire and the other members of the British Commonwealth of Nations, including the United Kingdom. Thereupon, it was said, Eire became, as the constitution of 1937 had already in terms provided, a sovereign and independent state. The combined effect of these various enactments, according to the argument, was to make the community of people domiciled in Eire cease to be what they had been, namely, British subjects. They became instead citizens of Ireland. The argument was reinforced by reference to a case decided in the Privy Council of *Moore* v. *Attorney-General for the Irish Free State* (1), where the position with regard to the powers of the legislature of the Irish Free State was stated by Viscount Sankey L.C. in his judgment as follows (2): "The effect of the Statute of "Westminster was to remove the fetter which lay upon "the Irish Free State Legislature by reason of the Colonial "Laws Validity Act. That Legislature can now pass Acts "repugnant to an Imperial Act."

This argument seems to me to break down at more than one point. There can be no doubt that by the Irish Free State Constitution Act, 1922, and the Irish Free State (Agreement) Act, 1922, the Irish Free State was given a position as a Dominion in the community of Nations known as the British Empire or the British Commonwealth of Nations. This legislation clearly in no way affected the status as British subjects of persons who up till that time had been of that nationality. That status was determined in any particular case by the provisions of the British Nationality and Status of Aliens Act, 1914, s. 1, sub-s. 1 (*a*), of which provides that

(1) [1935] A. C. 484.

(2) Ibid. 498.

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any persons born, as the appellant was, within His Majesty's dominions and allegiance, shall be deemed to be natural British-born subjects. The Constituent Act scheduled to the Irish Free State Constitution Act, 1922, and the constitution of the Irish Free State themselves "derived their "validity," as the Privy Council declared in the case of *Moore* v. *Attorney-General for the Irish Free State* (1), "from the "Act of the Imperial Parliament, the Irish Free State Con-"stitution Act, 1922." It cannot be supposed that the United Kingdom Parliament by this Act intended to deprive persons resident in the newly constituted Dominion of their British nationality. At any rate there is nothing in the Act that expresses any such intention, and I did not understand Serjeant Sullivan to contend otherwise. The removal by the Statute of Westminster in 1931 of any restriction upon the power of the legislature of the Irish Free State to pass legislation, whether repugnant or not to an Imperial Act, did not either expressly or by implication provide for any separation, described sometimes as the right to secede, from the British Commonwealth of Nations. Nor at any time, so far as I am aware after listening to the argument for the appellant, has it ever been declared in terms by the government of Eire, that the so-called right to secede has in fact been exercised. I am reluctant, for the reason I have already mentioned as to the finality of the judgment of this court in the present proceedings, to pronounce upon matters of such importance, but having regard to the argument submitted to us, an expression of my opinion on this point cannot be avoided. If I am wrong in the opinion I have thus expressed it would still be a matter for consideration whether secession by Eire could be effective unless and until the other members of the British Commonwealth of Nations had given recognition to Eire as a foreign state, so as to make the whole of its residents at the time of the secession, together with a number of persons born in Ireland and not resident there, though having an intention some day to return to Eire, aliens in the dominions of the Crown. Serjeant Sullivan seemed, unless I misunderstood him, to assume that recognition of Eire as seceding, at least by the United Kingdom, would be necessary, for he laid great stress upon his submission that the Act of 1938 recognizing Eire after it had enacted its new constitution in which the Crown found no place, produced the result for

(1) [1935] A. C. 484, 497.

which he contended before us. Whether or not this view is right I do not find it necessary to decide. In deference to the argument on behalf of the appellant I may, however, say that as I read the Agreements, and the Act of 1938 confirming them, even including the provisions of the Agreement regarding the treaty ports dealt with by Articles 6 and 7 of the Articles of Agreement of December 6th, 1921, I can see nothing, either in the terms of the Act or in the Agreements themselves, which does more than record and confirm agreements entered into between two sovereign members of the British Commonwealth. The fact that the new name "Eire" of the territory of the Irish Free State received statutory recognition in s. 1 of the Act seems to me to carry the matter no further. Sect. 1 of the Act was a machinery provision for construing enactments which used the old name, "Irish Free "State." It would not be proper for me, particularly in this case, to attempt to anticipate what steps would be necessary to make effective and complete any secession. It is sufficient to say that I am not satisfied that this has already taken place.

I must, however, deal with the contention on behalf of the appellant, as I understood it, on the assumption that there has been a complete separation of Eire from the United Kingdom and the other members of the British Commonwealth of Nations. The contention was that in that case the appellant ceased to be a British subject whenever the separation took place, because he is domiciled in Eire. The finding of fact that the appellant had the intention of returning to Eire at some future date was relied on, as showing that the domicil of origin said to have been possessed by the appellant had not been exchanged for a domicil of choice. There can be no doubt that apart from some treaty provision to the contrary, a British subject becomes an alien by the cession of British territory in which he is resident at the time of cession. (See Dicey's Conflict of Laws, 5th ed., p. 173.) Two decisions were relied upon on behalf of the appellant. *Doe d. Thomas* v. *Acklam* (1) and *Doe d. Auchmuty* v. *Mulcaster* (2). These decisions seem to me to illustrate clearly the principles applicable to such a case as the present. The first case arose out of the new state of affairs consequent upon a Treaty of Peace signed between His then Majesty and the United States of America on September 3, 1783. The right of the plaintiff to inherit land in England was in issue and the question

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(1) 2 B. & C. 779. (2) (1826) 5 B. & C. 771.

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turned upon the nationality of her father at the time of her birth which took place in 1784. The plaintiff's father had been at one time admittedly a natural-born British subject. Before the treaty he resided in the Colonies as they then were and he continued, after the treaty, to reside there. The plaintiff "was born after the independence of the Colonies "was recognized by the Crown of Great Britain: after the "Colonies had become united states and their inhabitants "generally citizens of those states, and her father, by his con-"tinued residence in those states, manifestly became a citizen "of them." This is the finding of Abbott C.J. The opposite conclusion was reached in the other case where the person on whose status the decision turned was found not to have been at the time of the Treaty in 1783 adhering to the United States. He in fact fought in the forces of the Crown and adhered to His then Majesty after the treaty.

In the present case, so far as the facts show, there is no ground on which the appellant can derive any support for his contention from the decision of *Doe d. Thomas* v. *Acklam* (1). He came to the United Kingdom in 1934 before the date of the suggested severance and he has resided here continually ever since. He is found by the special case to have been ordinarily resident in Great Britain since he came to England in 1934. The fact that he has a domicil of origin in Eire and has never acquired a new domicil of choice does not in my opinion touch the present question. Domicil is wholly different from nationality, and in my opinion is not even a relevant consideration in determining a man's nationality. The true position is stated by Lord Westbury in *Udny* v. *Udny* (2), where he said: "The law of England, and of almost all "civilized countries, ascribes to each individual at his birth "two distinct legal states or conditions; one by virtue of "which he becomes the subject of some particular country, "binding him by the tie of natural allegiance, and which may "be called his political status: another, by virtue of which he "has ascribed to him the character of a citizen of some "particular country, and as such is possessed of certain "municipal rights, and subject to certain obligations, which "latter character is the civil status or condition of the indi-"vidual, and may be quite different from his political status. "The political status may depend on different laws in different "countries; whereas the civil status is governed universally

(1) 2 B. & C. 779.

(2) (1869) L. R. 1 H. L. Sc. 441, 457.

"by one single principle, namely, that of domicil, which is "the criterion established by law for the purpose of determining "civil status."

On this contention also I think the appellant fails. Upon the whole matter I come back to the proposition which I have already stated. The appellant was admittedly up to 1922, and indeed up to 1937, a British subject by virtue of the British Nationality and Status of Aliens Act, 1914. Nothing, in my opinion, has deprived him of that status. The legislation which made him a citizen of the Irish Free State (Irish Free State Constitution Act, 1922) did no more than confer upon him a national character as an Irish citizen within the wider British Nationality. The same is true in my opinion of the Constitution of 1937. In the United Kingdom the appellant retains the status which is consequent upon the Act of 1914. That status is that of a British subject. It follows that he was rightly convicted of the offence with which he was charged.

In my opinion this appeal fails and must be dismissed.

HUMPHREYS J. I agree. The appellant is a natural-born British subject by virtue of s. 1, sub-s. 1, of the British Nationality and Status of Aliens Act, 1914, he having been born on December 23, 1908, within His Majesty's Dominions and allegiance. He is and has been since 1934 ordinarily resident in Great Britain. Being a man of military age he was required, on May 7, 1941, by a written notice in the prescribed form, to submit himself to medical examination in accordance with the terms of the National Service (Armed Forces) Act, 1939. He failed to comply with the requirements of that notice and was duly summoned to attend the court of summary jurisdiction at Leicester, where he was living, to answer an information charging him with having committed an offence against s. 3, sub-s. 4, of the last mentioned Act. It then occurred for the first time to the appellant or to his advisers that he was no longer a British subject and was therefore not liable for service in the armed forces of the Crown, but on the contrary, if we are to accept the argument of Serjeant Sullivan, had been for over three years an alien incurring penalties day by day for breaches of the Aliens Order, 1920.

How had that metamorphosis been achieved? It is not suggested that the appellant had evinced any desire or taken any step to change his nationality. Sects. 13, 14 and 15 of the British Nationality and Status of Aliens Act, 1914, provide for the loss of British nationality by British subjects who take certain steps for that purpose there referred to. It is not suggested that any of those sections meet the case of the appellant.

So far as I am aware, there is only one other way in which a natural-born British subject can lose his British nationality, namely, by loss of territory by the British Crown. If the Crown with the consent of the Imperial Parliament cedes to a foreign country or approves the secession of a portion of British territory, I think it is correct to say that the cession or secession involves a relinquishment not only of sovereignty over the soil of the territory, but also of the right to the allegiance of such of its inhabitants as elect to adhere to the new State.

The word "inhabitants" in this connection must receive its ordinary meaning, namely, the people residing in the territory lost to the Crown or, to use the expression of Abbott C.J. in *Thomas* v. *Acklam* (1), "the people composing the "State."

Now it has been argued that the Irish Free State, in which part of the British Dominions the appellant was born, has ceased to be a part of the British Dominions so that the inhabitants of that country, now called Eire, no longer owe allegiance to the Crown and are therefore no longer British subjects; and that is said to have happened, if I rightly understood the argument, in the year 1937. Assuming that argument to be correct, what effect would such secession have upon the nationality of the appellant? In my opinion none whatever. He was not and is not an inhabitant of Eire and owes no allegiance to any government which may have been set up in that country.

The question of his domicil is in my opinion quite irrelevant to the consideration of his nationality.

He was and remains a natural-born British subject and was rightly convicted by the justices of Leicester.

The question whether the important constitutional change contended for by counsel for the appellant has in law taken place is one which in my opinion does not call for decision in order to dispose of this case. For that reason, as well as for the reasons mentioned by my Lord, I am reluctant to express any final opinion upon that matter, and I content

(1) 2 B. & C. 779, 796.

myself with saying that having had the advantage of reading the judgment delivered by the Lord Chief Justice I see no reason to differ from the view which he has expressed upon that part of the case. I agree that the appeal should be dismissed.

SINGLETON J. The sole question for the decision of this court is whether at the material time the appellant was a British subject and as such liable to be called up under the National Services (Armed Forces) Act, 1939. Under the National Service Act, 1941, s. 11, the onus lies on the appellant to show that he is not a British subject. It is of interest to observe that the same test is applicable to the later Act and that, as the law stands, the appellant cannot be called on to perform any services, civil or military, under these Acts unless he is a British subject.

The British Nationality and Status of Aliens Act, 1914, provides by s. 1, sub-s. 1, that, "The following persons shall "be deemed to be natural-born British subjects: (*a*) any "person born within His Majesty's dominions and allegiance." It is common ground that the appellant was one to whom this applied in the first instance. Sects. 13 to 16 of the Act show how loss of British nationality may occur. The statute is one to consolidate and amend the enactments relating to British nationality and the status of aliens. It does not envisage anything in the nature of loss of status through cession of territory. It is refreshing to see that the legislature does not contemplate such a position. At the same time it must be recognized that loss of status as British subjects may follow on the cession of territory. That appears clearly from two reported cases, *Doe d. Thomas* v. *Acklam* (1) and *Doe d. Auchmuty* v. *Mulcaster* (2).

After the War of Independence a treaty was made between the Crown and the United States under which the Crown recognized the United States "to be free sovereign and "independent states; that he [His Majesty the King] treats "with them as such and for himself, his heirs and successors "relinquishes all claims to the Government . . . . of the same "and every part thereof." There was cession of territory by the Crown to the United States, and this was after an Act of Parliament, 22 Geo. 3, c. 46, "whereby His Majesty "was authorized to treat of and conclude a peace or truce

(1) 2 B. & C 779.

(2) 5 B. & C. 771.

"with the several American Colonies therein named." (See Judgment of Abbott C.J. (1).) Subsequent legislation recognized the United States as free and independent. It was decided by the Court of King's Bench in those two cases that thereupon those who were British subjects and inhabitants of the ceded territory had a right to elect. If they elected to remain in the ceded territory they lost their status as British subjects and became nationals of the United States; if on the other hand they showed by their actions an election to the contrary they retained their status as British subjects.

It is unnecessary for the purposes of the present case to go further back than the Irish Free State Constitution Act, 1922, under which the constitution of the Irish Free State was established. Under art. 1 of sch. 1 the Irish Free State is a co-equal member of the community of nations forming the British Commonwealth of Nations.

Art. 3 states who are citizens of the Irish Free State. It was admitted by Serjeant Sullivan that such persons were at that time, and until 1937, British subjects.

In 1931 the Statute of Westminster was passed. It was argued by Serjeant Sullivan that that Act gave the Irish Free State the right to secede from the British Commonwealth of Nations. I do not regard it as necessary for the purposes of this case to express a decided opinion upon that submission. I venture to point out, however, that the whole fabric of the Act is based upon all the Dominions (including the Irish Free State) being and remaining members of the British Commonwealth of Nations. The singlehanded departure of one is not within the conception of the statute, as appears clearly from the preamble. I doubt whether it was within the power of one Dominion to alter the status of British subjects within or without that Dominion without agreement of the others, but for reasons which appear later it is unnecessary to decide that question.

It is clear from the Statute of Westminster itself and from the decision of the Privy Council in *Moore* v. *Attorney-General of the Irish Free State* (2) that the legislature of one of the Dominions can now pass Acts repugnant to an Imperial Act. That is far from saying that they can alter the status of British subjects wherever they may be.

Serjeant Sullivan proceeded to argue that the Government of Ireland or of that part of it formerly called the Irish Free

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(1) 2 B. & C. 795.

(2) [1935] A. C. 484.

State, being authorized to do so by the Statute of Westminster enacted the Constitution of Ireland, 1937, and that thereupon those who were British subjects (and at the same time subjects of the Irish Free State) ceased to be British subjects and became subjects of Eire.

We were referred to the Constitution of Ireland, arts. 1, 2, 3, 4, 5, 9 and 12. Of these I will read four only. Art. 4: "The name of the State is Eire, or, in the English language, "Ireland." Art. 5: "Eire (Ireland) is a sovereign, independent, "democratic State." Art. 6: "All powers of government, "legislative, executive and judicial, derive, under God, from "the people, whose right it is to designate the rulers of the "State and, in final appeal, to decide all questions of national "policy, according to the requirements of the common good. "These powers of government are exercisable only by or on "the authority of the organs of State established by this "Constitution." Art. 9: "On the coming into operation of "this Constitution any person who was a citizen of Saorstat "Eireann immediately before the coming into operation of "this Constitution shall become and be a citizen of Ireland." It was submitted on behalf of the appellant that by reason of this Constitution he ceased to be a British subject and became a citizen of Eire. It is common ground that the appellant and those in the like case have not been treated as aliens but have been accorded the rights and privileges of British subjects. Art. 62 provides how and when the constitution is to come into operation, and on the cover there are the statements "enacted by the People, 1st July, 1937" and "In operation "as from 29th December, 1937."

It was argued further by Serjeant Sullivan that this measure or constitution had been recognized by Parliament of the United Kingdom and he referred us to the Eire (Confirmation of Agreements) Act, 1938. I confess that I wholly fail to find in that Act any recognition of Eire as a sovereign, independent, democratic State, or any recognition of its departure from the British Commonwealth of Nations (if it has so departed), or indeed any recognition of the Constitution of 1937. There is no recital of the measure nor any reference to it. There is in s. 1 a recognition of change of name to Eire and that is all. Statutory force is given to two agreements which are such as might be made between the United Kingdom and any of the Dominions, and there is nothing more. It seems to me that there is no substance in Serjeant Sullivan's point as to recognition. I fail to find anything to show me that the Government which was set up in that part of Ireland which was formerly the Irish Free State has been recognized by His Majesty's Government as a sovereign, independent, democratic State. If I am right in that conclusion, Serjeant Sullivan must fall back entirely on the Statute of Westminster followed by the Constitution of 1937. He claims that there was a secession. Assuming that having regard to the structure of the British Commonwealth of Nations there could be a secession by one part or Dominion, what is the effect of it on those who were British subjects? It is clear that cession of territory of itself does not rob a person of his status as a British subject. On cession he still has the right to elect what he will do. Cession involves the agreement of two parties, the one who cedes and the one to whom the cession is granted. Is it not clear above all that secession cannot have a greater effect than cession?

I find it impossible to see how and when the subject is to exercise his choice unless there has been either agreement or recognition. If Great Britain ceded territory (as in 1783) the subject was not deprived of his status as a British subject unless he had shown by his action (for example, by remaining in the ceded territory) that he elected so to do. In the case of Eire, when have British subjects had the right or opportunity to elect? How could it arise in the absence of agreement or recognition by His Majesty's Government? I cannot accept the argument that a British subject can be deprived of his status as such merely by the Act of some Government, State or Dominion elsewhere. He always has the right to elect, and there must be some certainty as to the position, else he cannot be called upon to do that. In any event the onus of showing he is not a British subject is on the appellant. He has wholly failed to satisfy me of any recognition by His Majesty's Government of the position which he claims, and until that is shown I do not think that British subjects are called on to exercise their option.

And there is a further difficulty. Serjeant Sullivan claimed that all those who were British subjects (and at the same time subjects of the Irish Free State) had ceased to be British subjects. I suppose he based this on art. 9 of the Constitution of 1937, but he did not make this very clear. The change of status which may follow on cession of territory is one which affects inhabitants of that territory. The appellant has lived in England since 1934. He cannot be said to have shown any desire to cease to be a British subject. It is true that when he was called under the National Service (Armed Forces) Act he claimed to be no longer a British subject. The appellant was a British subject resident in this country. He did not cease to be so by reason of "The Constitution of Ireland." If the Constitution of 1937 had the effect which was claimed for it the appellant could thereupon have elected. As Bayley J. said in *Doe d. Auchmuty* v. *Mulcaster* (1), the law did not enable him to do so at some future time. In my view the appellant was at the material time (namely, May 7, 1941) a British subject resident in this country. He had not ceased to be so by reason of the "Constitution of Ireland."

I agree that this appeal fails.

Appeal dismissed.

Solicitors for appellant: *Bryan O'Connor & Co.*

Solicitor for respondent: *Solicitor to Ministry of Labour and National Service.*

R. F. S.

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(1) 5 B. & C. 771, 775.

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Ex parte MARYLEBONE BOROUGH COUNCIL.

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Apr. 17.

Local government—Housing—Accommodation of working classes—Flat let at more than 20l. a year—Claim for possession—Jurisdiction of magistrate—Small Tenements Recovery Act, 1838 (1 *&* 2 *Vict. c.* 74), *s.* 1—*Housing Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 83, *sub-s.* 1; *s.* 156, *sub-s.* 2.

A local authority which has, in the exercise of its powers under the Housing Acts, provided houses for the accommodation of the working classes, is entitled under s. 156, sub-s. 2, of the Housing Act, 1936, to apply to a magistrate under the Small Tenements Recovery Act, 1838, to recover possession of a house the rent of which is in arrear for more than one week, notwithstanding that the rent of the house is more than 20*l.* a year, since the power of management conferred on the local authority by s. 83 of the Housing Act, 1936, includes the power to recover possession of a house the rent of which is in arrear that the local authority may let it to another member of the working classes.

APPLICATION for order of mandamus directing a Metropolitan police magistrate sitting at Marylebone police court to hear and determine a complaint made before him on June 24, 1941, by W. C. Normile on behalf of the Marylebone borough council against Johanna O'Leary for the recovery of possession of No. 4 Gibbon House, Fisherton Street, Marylebone, under the Small Tenements Recovery Act, 1838 (1).

Marylebone borough council, in pursuance of its powers and duties under the Housing Act, 1936, owned and managed the Fisherton Street Housing Estate which consisted of blocks of flats erected by the council for occupation by persons of the working classes. On July 15, 1935, the council let one of the flats, namely, 4 Gibbon House, consisting of four rooms, to Johanna O'Leary on a weekly tenancy at a weekly rent of 20*s.* On May 17, 1941, W. C. Normile, the council's resident superintendent of the housing estate, on behalf of the council,

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(1) The Small Tenements Recovery Act, 1838, provided in effect by s. 1 that where the rent of premises does not exceed 20*l.* a year, and the interest of the tenant of such premises has been determined by a legal notice to quit, the landlord may give him notice of his intention to proceed to recover possession under the authority of that Act. If the tenant does not appear, or fails to show cause why he does not give possession, the justices may issue their warrant directing the constable to give the landlord possession within a period not less than twenty-one nor more than thirty clear days from the date of the warrant.

By Housing Act, 1936, s. 83, sub-s. 1 (which is in Part V. of the Act headed: "Provision of "housing accommodation for "the working classes"): "The "general management, regulation, "and control of houses provided "by a local authority under this "Part of this Act shall be vested in "and exercised by the authority, "and the authority may make "such reasonable charges for the "tenancy or occupation of the "houses as they may determine."

By s. 156, sub-s. 1: "Nothing "in the Rent and Mortgage "Interest Restrictions Acts, 1920 "to 1933, as amended by any "subsequent enactment shall be "deemed . . . . to prevent possession being obtained—(*a*) of "any house possession of which "is required for the purpose of "enabling a local authority to "exercise their powers under any "enactment relating to the "housing of the working classes ". . . ." Sub-s. 2: "Where a "local authority, for the purpose "of exercising their powers under "any enactment relating to the "housing of the working classes, "require possession of any building or any part of a building of "which they are the owners, then, "whatever may be the value or "rent of the building or part "of a building, they may obtain "possession thereof under the "Small Tenements Recovery Act, "1838, as in the cases therein "provided for, at any time after "the tenancy of the occupier has "expired, or has been determined."

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personally served on Johanna O'Leary notice in writing to quit the premises. On June 15, 1941, W. C. Normile personally served Johanna O'Leary with a notice for the recovery of possession in accordance with the provisions of the Small Tenements Recovery Act, 1838. Johanna O'Leary failed to comply with the notice and remained in possession of the premises. On June 24, 1941, the solicitor for the borough council appeared before the Metropolitan police magistrate sitting at Marylebone police court in support of a complaint made by W. C. Normile on behalf of the council against Johanna O'Leary and to ask for his warrant for the delivery of possession of the premises to the council in accordance with the provisions of the Small Tenements Recovery Act, 1838. The solicitor for the borough council opened the complaint before the magistrate and told him that he was prepared to call evidence to prove the facts hereinbefore stated and that the occupants of the premises were a nuisance to other tenants of the council on the housing estate by reason of their noise, filthy language and dirty habits. The solicitor also informed the magistrate that, inasmuch as the rent of the premises exceeded 20*l.* a year, there was a doubt as to his jurisdiction in the matter under that Act, but he referred the magistrate to ss. 83 and 156 of the Housing Act, 1936, and submitted that by virtue of the provisions thereof he had jurisdiction to hear and determine the complaint and issue a warrant for the recovery of the premises under the Small Tenements Recovery Act, 1838. The magistrate came to the conclusion that he had no jurisdiction as the rent of the premises exceeded 20*l.* a year. The magistrate stated in an affidavit filed by him that the grounds for his decision that he had no jurisdiction to hear and determine the complaint were that he was of the opinion that the facts which the solicitor for the borough council informed him that he was able to prove did not establish that the local authority required possession of these premises for the purpose of exercising their powers under any enactment relating to the housing of the working classes; that the ordinary relationship of landlord and tenant applied; and that, as the rental exceeded 20*l.* a year, he had no such jurisdiction.

H. G. Robertson for Marylebone borough council. An order for mandamus to the magistrate at the Marylebone police court to hear and determine the council's application ought to be made. The magistrate refused to entertain the application as the rent of the premises exceeded the limit of 20*l.* per annum mentioned in the Act of 1838. The Housing Act, 1936, by s. 156, sub-s. 2, removed the limitation of 20*l.* per annum in the Act of 1838 in cases where the local authority require possession of any building for the purpose of exercising their powers under any enactment relating to the housing of the working classes. The Housing Act, 1936, imposed on local authorities the duty of getting rid of unsanitary premises and of providing housing accommodation for persons of the working classes. Local authorities which have provided such housing accommodation are invested by s. 83 with the general management, regulation and control of such houses, and the power to manage a house must include power to get rid of an undesirable tenant. The legislature considered that the procedure under the Small Tenements Recovery Act, 1838, was a more convenient method for local authorities to recover possession of houses provided by them for the accommodation of members of the working classes whatever the rent of such houses might be than the usual method of recovery in the county court and in that respect local authorities were put in a more advantageous position than an ordinary landlord.

Ryder Richardson for the magistrate. If the contention on behalf of the local authority is correct the result will be that if the rent of a house provided by a local authority under the Housing Acts for the accommodation of members of the working classes is in arrear for one week, the local authority will be able to apply to a magistrate under the Act of 1838 to issue a warrant for the recovery of possession, and the tenant will lose the protection afforded by the Rent Restriction Acts inasmuch as the magistrate has no power under the Act of 1838 to give the tenant more than thirty days grace before giving up possession. So long as the Rent Restriction Acts are in force a local authority cannot apply to a court of summary jurisdiction for the recovery of possession of a house on the ground of non-payment of rent. The authority must apply to a county court in accordance with the provisions of the Rent Restriction Acts like any ordinary landlord. A local authority can only apply to a court of summary jurisdiction for the recovery of possession of a house in the cases set out in s. 156 of the Housing Act, 1936, namely, where possession of the house is required to secure compliance with by-laws made for the prevention of overcrowding, or to enable redevelopment plans to be proceeded with, or where the owner has given an undertaking that the premises shall not be used for human habitation, or where a closing order is in force in respect thereof. If Parliament had intended that s. 156, sub-s. 2, should mean what is contended, Parliament would have so provided in clear terms. A local authority can manage their property even though the houses are in the occupation of tenants. They do not require possession of a house in order to manage it. If a tenant is undesirable, the authority can get rid of him by going to the county court and obtaining an order for possession. The words in s. 156, sub-s. 2: "Where a local authority, for the purpose of exercising their "powers under any enactment relating to the housing of the "working classes, require possession of any building" must mean that the local authority require possession to carry out their powers under the Act, which is quite different from exercising their powers as landlord to change their tenant.

H. G. Robertson replied.

Viscount Caldecote C.J. I have come to the conclusion that the order should be made for reasons which will be stated by my brother Cassels.

Humphreys J. I have arrived at the same conclusion, although during the argument I confess that I have from time to time felt some doubts. One of the doubts which troubled me was whether, as argued by Mr. Ryder Richardson, it was likely that Parliament intended to render a member of the working classes who was a tenant of a dwelling-house which was part of a housing estate provided and owned by a local authority acting under the Housing Act of 1936 liable to treatment by the local authority which no other landlord would be able to apply to a tenant. It was suggested that, while the Rent Restrictions Acts applied so as to prevent the High Court and the county court from turning out a tenant notwithstanding the tenancy had expired or the owner of the premises was entitled to recover possession, except on terms, yet s. 156, sub-s. 2, of the Housing Act, 1936, enabled a local authority acting under that Act to go to a court of summary jurisdiction which would have no power to extend the term of the residence of the tenant. I am satisfied that that argument is not correct, and that in truth the magistrate upon such an application is in substantially the same position as the High Court or the county court qua the making of an order for possession against a tenant under the Increase of Rent and Mortgage Interest (Restrictions) Act. As to the other points which have been raised, I, like my Lord, prefer to leave it to my brother Cassels to state the reasons which make me agree with the proposal of my Lord.

Cassels J. This case raises the question whether in circumstances like those in the present case a court of summary jurisdiction has jurisdiction to consider an application under the Small Tenements Recovery Act, 1838, for possession of premises which are provided and owned by a local authority under the Housing Act, 1936, notwithstanding that the rent is above the limit mentioned in the Act of 1838, namely, 20*l.* a year. It has been suggested in the course of the argument that, if the rent is above 20*l.* a year, a local authority acting under the Housing Act, 1936, must go to the county court where other landlords must go if the rent is over 20*l.* a year, and cannot have recourse to a court of summary jurisdiction.

It is said on behalf of the borough council that they derive power to own, let and manage a housing estate, for the accommodation of the working classes, only by reason of the Housing Act, 1936, and that s. 156, sub-s. 2, of that Act enables them to go to the court of summary jurisdiction. The ground for that is said to be found in s. 83, sub-s. 1, of the Act, which provides that the general management, regulation and control of houses provided by a local authority under the Act shall be vested in and exercised by the authority. On the other hand, it was contended on behalf of the respondent that it was never the intention of the legislature to enable local authorities acting under the Housing Act, 1936, to do what another landlord had no power to do, that is to say, to go to a court of summary jurisdiction, whatever the rent of the house may be, and obtain a warrant for possession. It was contended on behalf of the respondent that if that were so, by reason of the mandatory nature of the language of the Small Tenements Recovery Act, 1838, s. 1, a magistrate or justices sitting to hear an application of this kind, would find himself or themselves compelled immediately to grant the application, with the sole reservation of only thirty days, and that after that the tenant must go out no matter how sympathetic the magistrate or justices might be to him.

When that argument came to be considered it was discovered that it was not quite sound, because in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, special provision was made for the hard case which Mr. Ryder Richardson conjured up before us, for it was provided by sub-s. 4 of s. 5 of that Act: "Notwithstanding anything "in . . . . s. 1 of the Small Tenements Recovery Act, 1838, "every warrant for delivery of possession of, or to enter and "give possession of, any dwelling-house to which this Act "applies, shall remain in force for three months from the day "next after the last day named in the judgment or order for "delivery of possession or ejectment, or, in the case of a "warrant under the Small Tenements Recovery Act, 1838, "from the date of the issue of the warrant, and in either case "for such further period or periods, if any, as the court shall "from time to time, whether before or after the expiration of "such three months, direct." That is a clear indication that a very full discretion is possessed by the magistrate or justices when listening to an application under the Small Tenements Recovery Act, 1838. Indeed, a local authority, in making such an application and having it heard by the court of summary jurisdiction, might well find themselves faced by a magistrate who was prepared to exercise this discretion and to adjourn the case for periods of three months over and over again, so that the authority would never succeed in getting possession of the premises.

That argument having gone, it seemed to be a little difficult to substantiate—unless it could be done by reference to the limited nature of the wording of the Act of Parliament itself—the contention that, while members of the working classes occupying houses or flats erected for the accommodation of the working classes must necessarily be taken to the county court or to the High Court if the rent was more than 20*l.* before possession can be obtained, other people who do not belong to the working classes, although very poor—would have the advantage of being taken to a court of summary jurisdiction if the rent was under 20*l.*, and have their cases decided quickly and cheaply. One must look to see whether provision is really made in the Housing Act, 1936, for the jurisdiction of a magistrate in an application of this kind.

This court has come to the conclusion that there is jurisdiction in a court of summary jurisdiction to hear an application of this kind. There is no question but that the Housing Act, 1936—a very comprehensive Act—made provision for a local authority to be the landlords of premises let to tenants who are members of the working classes. They could erect and own flats and let them out to tenants. The provision which dealt with that matter was s. 83, sub-s. 1, under which a local authority may carry out the purposes of this Act by managing an estate for the accommodation of members of the working classes. Management includes letting. Letting presupposes a tenant.

If the local authority as landlords required possession of the premises which a tenant occupied, it might be because he had not paid his rent, or because he was a nuisance as this particular tenant is said to have been, or it might be that he had ceased to be a member of the working classes by inheriting money and for that reason was no longer qualified to occupy the premises as a member of the working classes. Whatever it may be, so long as the purpose for which the local authority requires possession of the premises is within the Act (namely, to let the premises to another member of the working classes) that comes within the management of the premises within s. 83, sub-s. 1, of the Housing Act, 1936, and is within the purposes of the Act.

If it is within the purposes of the Act, s. 156, sub-s. 2, applies. It is clear, from the wording of that sub-section, that Parliament had in mind the possibility that, if a local authority were to go to a court of summary jurisdiction for possession of the premises, they might be met by the limitation of value or rent set out in the Small Tenements Recovery Act, 1838. That being so, Parliament has provided by sub-s. 2 of s. 156: "Where a local authority, for the purpose of exercising their "powers under any enactment relating to the housing of the "working classes, require possession of any building or any "part of a building of which they are the owners, then, what-"ever may be the value or rent of the building or part of a "building, they may obtain possession thereof under the "Small Tenements Recovery Act, 1838, as in the cases therein "provided for, at any time after the tenancy of the occupier has "expired, or has been determined." If it could have been contended in this case that this local authority did not require possession of these premises for the purpose of letting to another member of the working classes, but for the purpose of erecting a school or widening a road, or for some other purpose which was not within the Act, the magistrate would have been

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entitled to say that he had no jurisdiction to hear the application. That was not so and, for the reasons which I have given, this court decides that the order of mandamus should issue to the magistrate to hear and determine.

Order for mandamus.

Solicitor for Marylebone borough council: *Samuel Coleman.*
Solicitor for magistrate: *Treasury Solicitor.*

R. F. S.

BRITISH FERMENTATION PRODUCTS, LIMITED *v.* BRITISH ITALIAN TRADING COMPANY, LIMITED.

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Apr. 29.

Food and drugs—Contravention of statute due to act of persons other than sellers—Proceedings by sellers against other persons—Proceedings by those other persons against third persons—Competence—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 83, *sub-s.* 1.

By s. 83, sub-s. 1, of the Food and Drugs Act, 1938, " A person " against whom proceedings are brought under this Act shall, " upon information duly laid by him . . . . be entitled to have " any person to whose act or default he alleges that the contravention of the provisions in question was due brought before " the court in the proceedings, and, if, after the contravention " has been proved, the original defendant proves that the " contravention was due to the act or default of that other person, " that other person may be convicted of the offence, and, if the " original defendant further proves that he has used all due " diligence to secure that the provisions in question were complied " with, he shall be acquitted of the offence " :—

Held, that the section allowed a person against whom an information had been laid for contravention of the provisions of the statute, in his turn to lay another information against any other " person to whose act or default he alleges that the contravention of the provisions " of the statute " was due," and that the section allowed this procedure to be followed down a chain of persons, the person against whom each further information is laid being " a person against whom proceedings are taken under " the Act," and the words " the original defendant " applying to the person who has laid the information.

CASE stated by justices.

At a court of summary jurisdiction sitting at Aylesbury, an information was preferred under s. 6 of the Food and Drugs

Act, 1938 (1), by Thomas Harold Jenks against I. Beer and Sons, Ld. (hereinafter called " the first defendants ") for that they on March 11, 1941, did unlawfully give with certain food, to wit, egg equivalent, sold by them to Herbert Ernest Nicholls, a label which was then calculated to mislead as to the nature, substance and quality of the said food contrary to s. 6. At the same court an information was preferred under s. 83, sub-s. 1, of the Act for and on behalf of the first defendants that the contravention of the provisions in question was due to the act of the British Italian Trading Co., Ld. (hereinafter called " the respondents "). At the same court an information purporting to be preferred under s. 83, sub-s. 1, was preferred for and on behalf of the respondents that the contravention of the provisions in question was due to the act of British Fermentation Products, Ld. (hereinafter called " the "appellants ").

On the hearing of the informations, which were heard together, the following facts were admitted or proved: (1.) The first defendants on March 11, 1941, contravened the provisions of s. 6 in manner described in the information. (2.) The provisions of s. 83, sub-s. 1, as to the giving of notice to the prosecution had been complied with on the part of the first defendants. (3.) The contravention of the provisions in question was due to the act of the respondents. (4.) The first defendants had used all due diligence to secure that the provisions in question were complied with. (5.) The provisions of s. 83, sub-s. 1, as to the giving of notice to the prosecution had been complied with on the part of the respondents. (6.) The contravention of the provisions in question was due to the act of the appellants. (7.) The respondents had used all due diligence to secure that the provisions in question were complied with. The justices, being of opinion (1.) that the

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(1) Food and Drugs Act, 1938, s. 83, sub-s. 1: " A person against " whom proceedings are brought " under this Act shall, upon " information duly laid by him and " on giving to the prosecution " not less than three clear days' " notice of his intention, be " entitled to have any person to " whose act or default he alleges " that the contravention of the " provisions in question was due " brought before the court in the " proceedings, and, if, after the " contravention has been proved, " the original defendant proves " that the contravention was due " to the act or default of that " other person, that other person " may be convicted of the offence, " and, if the original defendant " further proves that he has used " all due diligence to secure that " the provisions in question were " complied with, he shall be " acquitted of the offence."

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respondents were "a person against whom proceedings were "brought under the Act," and (2.) that the acts or defaults of the first defendants in relation to the offence could be imputed in law to an act or default on the part of the appellants, acquitted the first defendants and the respondents, but convicted the appellants of the offence and ordered them to pay a fine and costs. The question for the opinion of the court was whether the justices, on the above statement of facts, came to a correct determination and decision in point of law.

Linton Thorp K.C. and *Sebag Shaw* for the appellants. The words in s. 83, sub-s. 1, of the Food and Drugs Act, 1938, "a person against whom proceedings are brought under "this Act" are perfectly general, but the section goes on to provide for the acquittal of the original defendant on proof by him of the contravention of the Act by some other person. The "original defendant" must mean the person against whom proceedings are originally brought. In the present case I. Beer & Sons as the original defendants were entitled to proceed against the British Italian Trading Co., who had supplied them with the false label, but that company were not entitled to say that they received the labels from another firm. Sect. 83, sub-s. 1, therefore, did not entitle the justices to hear the complaint against the appellants. The appellants should have been proceeded against under another section of the Act for giving a false warranty apart from the label.

Healy K.C. and *G. L. Hardy* for the respondents. The difficulty as to the meaning of the words "the original "defendant" in s. 83, sub-s. 1, is obviated if the section is construed so that "the original defendant" becomes the prosecutor in the next link of the chain of prosecution. It would defeat the object of the section, which is to punish the real offender, if a limited meaning is given to the words. The result of the argument advanced on behalf of the appellants would be to deprive an innocent person of a defence which it was intended by the Act to give him.

Thorp K.C. in reply. A chain of causation was never contemplated by the section.

VISCOUNT CALDECOTE C.J. Sect. 83, sub-s. 1, of the Food and Drugs Act, 1938, provides for the consequences of committing an offence being placed on the right shoulders. The question here is whether the machinery provided by the sub-section enables more than one step to be taken to reach the guilty person.

In my opinion s. 83, sub-s. 1, permits the action against the appellants which has been taken. The person against whom proceedings are brought is permitted to lay an information against the person to whose act or default the contravention is due. When an information of that sort has been laid the person against whom that information is laid appears to me to be in his turn " a person against whom proceedings are "brought under this Act," and thereupon the words " the "original defendant " apply to the person who has laid the information. There is no reason why Parliament should not have intended to allow this procedure to be followed down a chain of persons. Having regard to the fact that fresh proceedings are to be taken by laying an information, I think that the words of the sub-section allow a person against whom such an information was laid in his turn to lay another information, and the operation of the section then begins over again. In my view, the appeal fails.

HUMPHREYS J. I agree. The justices, in my opinion, acted properly in allowing the British Italian Trading Co. to bring the British Fermentation Products, Ld. before the court. Thereupon, the British Italian Trading Co., who had been the original defendants in the proceedings ceased to be the defendants and the present appellants became the defendants. Again, on the facts the justices were entitled to find, as they did, that the British Italian Trading Co. had used all due diligence to prevent the commission of the contravention of the Act which had taken place and that that contravention by them of the Act was due to the act or default of the appellants. In that way justice was satisfied by the acquittal of I. Beer & Sons and the British Italian Trading Co. and the conviction of the persons who were in fact responsible for the giving by themselves and by both of the other parties in turn a false label. Any other result would tend to create an injustice, and, therefore, I think, the language of the section is satisfied by the construction which the justices put on it and the argument of the appellants fails.

CASSELS J. I agree. I am satisfied that the object of s. 83 of the Act of 1938, was to avoid multiplicity of proceedings.

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The words in the section, "upon information duly laid," indicate clearly that a person is to be "entitled to have any "person to whose act or default he alleges that the contravention of the provisions in question was due, brought" by proper process, "before the court." Then, the parties being before the court, the court has to ascertain who really is to blame. The terms of the section make it plain that Parliament contemplated that many parties might be before the court. Sub-sect. 2 (*b*) provides: "the court may make such order as "it thinks fit for the payment of costs by any party to the "proceedings to any other party thereto," so ample provision is made for having all the parties before the court in the same proceedings and at the same hearing. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *A. Kramer & Co.*
Solicitors for respondents: *Travers Smith, Braithwaite & Co.*

R. F. S.

BEAK (INSPECTOR OF TAXES) *v.* ROBSON.

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May 5.

Revenue — Income tax — Manager and director — Service agreement — Separate sum paid in consideration of restrictive covenant—Restrictive covenant not coming into force until after period of employment is ended—Separate sum not chargeable to income tax under sch. E—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *sch. E.*

By an agreement dated October 4, 1937, a company agreed to employ R. as manager and director for five years at a salary of 2000*l.* per annum and bonuses. By cl. 6 of the agreement the contract was made terminable by either side on six months' notice in writing expiring on or after September 30, 1940. Cl. 7 provided for payment of 7000*l.* to R. on the execution of the agreement in consideration of his entering into the restrictive covenant contained in cl. 8. Cl. 8 provided that if the agreement should be determined by notice in writing given by R. to the company or by any breach by him of the provisions of the agreement, then from such determination or breach he was not without the consent of the company either solely or jointly with, or as manager or agent for, any other person, persons or company to carry on or be engaged, concerned or interested in a competing business within fifty miles of Newcastle-upon-Tyne:—

Held (affirming Lawrence J.), that R. was not assessable to income tax under sch. E in respect of this sum of 7000*l.* It was not paid to him for performing the services in respect of which he was chargeable under sch. E.

APPEAL from Lawrence J.

By an agreement dated October 4, 1937, the respondent agreed to serve William Mathwin & Son (Newcastle), Ld., as manager and director for five years at a salary of 2000*l.* per annum and certain bonuses. By cl. 6 the agreement was to be terminable by either party by six months' notice in writing expiring on September 30, 1940, or at any time thereafter. The agreement concluded with cls. 7 and 8 which were in the following terms:

"(7.) In consideration of the restrictive covenant on the "part of Mr. Robson contained in the next succeeding clause "hereof the company shall on the execution hereof pay to "Mr. Robson the sum of 7000*l.*"

"(8.) If this agreement shall be determined by notice "given by Mr. Robson to the company under cl. 6 hereof or "by any breach by him of the provisions of this agreement "then from such determination or breach until the determination of a period of five years from April 1, 1937, Mr. Robson "shall not without the consent in writing of the company "either solely or jointly with or as manager or agent for any "other person, persons or company directly or indirectly carry "on or be engaged, concerned or interested in the business "of coal exporter, coal merchant or shipbroker within fifty "miles of Newcastle-upon-Tyne."

The sum of 7000*l.* was duly paid on the execution of the agreement and an assessment was made in this sum for the year ending April 5, 1939, under sch. E of the Income Tax Act, 1918.

The Commissioners for the General Purposes of the Income Tax Acts for the division of Newcastle City gave a decision in which they said that they were of opinion that the contract of October 4, 1937, was a bona fide contract and that it contained two agreements, the first being an ordinary service agreement and the second in cls. 7 and 8 providing for a payment for the giving up of a right wholly unconnected with the respondent's office as director and manager and operative only after he ceased to hold that office. They therefore discharged the assessment.

On a case stated by way of appeal Lawrence J. dismissed the appeal on the ground that the sum of 7000*l.* did not come from having or exercising the office of director and manager but from absence from employment in a certain area after the cessation of the office.

The Crown appealed.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. The sum paid in respect of the restrictive covenant is a profit of the office and as such taxable under the Income Tax Act, 1918, sch. E, r. 1. It makes no difference that the covenant is to come into effect after the period of service has expired. The test is whether the profit accrued to the respondent by virtue of his office: see *Herbert* v. *McQuade* (1). Any payment which is made as a condition of the employment is taxable under sch. E. The consideration for the employment with all its conditions, whether they are to be performed during or after the termination of the employment, is remuneration of the employment. If a man employed a secretary with a condition that the secretary was not after being in his service to write any book in which he appeared and agreed to pay the secretary a salary of 500*l.* a year, that salary would clearly be taxable under sch. E. Could it make any difference if the secretary was paid a salary of 400*l.* a year and a sum down for agreeing to this condition? It would be different if the service agreement contained a separate contract by which for payment of a sum the servant's motor car was to be handed over to the employer at the end of the period of service. There would then be a payment for a chattel. *Hunter* v. *Dewhurst* (2) and *Cameron* v. *Prendergast* (3) really have no bearing on this case. If Lawrence J.'s conclusions were right, it might be possible to split up the salary paid in respect of an office and say part of it was attributable to conditions entered into in the service agreement and therefore that only the remainder of the salary is taxable under sch. E. As long as remuneration is payable in respect of the office it is taxable under sch. E. Here, but for the office for which the respondent was being employed, no question of his entering into the restrictive covenant would have arisen.

[They also referred to *Anglo-Persian Oil Co., Ld.* v. *Dale* (4).]

Cyril King K.C. and *Charlesworth* for the respondent were not called upon.

LORD GREENE M.R. In my opinion, this is a clear case and the decision of Lawrence J. was manifestly right.

It is to be observed that the way in which the parties have chosen to contract is one in which the obligations flowing from the contract of service and the remuneration to be

(1) [1902] 2 K. B. 631.
(2) (1932) 16 Tax Cas. 605.
(3) [1940] A. C. 549.
(4) [1932] 1 K. B. 124.

received by the respondent in respect of that service are entirely separated from the restrictive covenant and the consideration which is given for it. Separate considerations are fixed for the two things; one consideration for the service, a totally different consideration for the covenant. Breach of the contract of service has nothing to do with breach of the covenant. Conversely, breach of the covenant would have nothing to do with the contract of service.

It seems to me that those facts would by themselves be quite sufficient to dispose of this case. The sum of 7000*l.* is not paid to the respondent for performing the services in respect of which he is chargeable under sch. E. The consideration which he has to give under the covenant falls to be given not during the period of his employment, but after its termination. In fact, he is selling to the company for a sum of 7000*l.* the benefit of a covenant which will only come into effect when the service is concluded. It seems to me that to say that that 7000*l.* is a profit or remuneration from his office is to ignore the real nature of the transaction.

But it is said that this covenant is a condition of the service into which he enters by agreeing to serve as director and manager. That observation is no doubt true, in the sense that this particular provision with regard to the covenant is found in the contract of service and no doubt the parties would not have entered into that contract of service unless that term had been agreed upon; but it seems to me impossible to proceed from that to the further step and say that because this provision is a condition of the service in that sense, therefore the remuneration paid is remuneration from the service. I put the example in the course of the argument of a man appointed a manager for a period of years at a definite remuneration. One of the terms might be that while the employment continues he is to use his motor car for the purposes of his employers. The contract might go on to say that on the termination of the employment he, in consideration of a sum paid down, would transfer the motor car to the employers as their own property. It seems to me it would be impossible to suggest in such a case that the sum he received in consideration for the undertaking to transfer the motor car would be remuneration from his employment. I cannot myself see any difference between that case and the present. In each case the employee is contracting to sell something to his employer at the termination of his agreement and receives a particular and specific consideration for it.

It was suggested then that restrictive covenants of this kind are commonly found in managerial agreements without there being any specific consideration allocated to them. That no doubt is true and in some cases covenants of that kind may be valid in law; but, quite apart from the question of their validity, it is common knowledge that many managerial agreements do contain clauses of that kind. If, for a fixed remuneration, a man agrees to serve and without any additional remuneration agrees to enter into such a covenant, I cannot myself see how it can be suggested that the covenant in some way or another must be regarded as something outside the contract of service.

It was suggested that if the respondent was successful in the present case it would be necessary—or legitimate at any rate—in all such cases as those to which I have referred to segregate the covenant not to compete from the covenants relating to the service and attribute some apportioned part of the consideration to the former, with the result that parts of salaries would escape taxation under sch. E. Arguments of that kind can be dealt with if and when anyone has the hardihood to make such a claim; but that is not the present case. The fact that the parties could, if they had so desired, have cast their agreement in a form under which for increased remuneration the respondent agreed to serve and then merely gave this covenant, is beside the point. They have not done that. They have entered into an agreement which, although contained in one document and although made on the same occasion and although connected in the way I have indicated, really relates to two quite different matters, one the period of service, one something that is to happen after the service. The fact that they have decided on and allocated to that covenant an agreed consideration seems to me to take it right outside the class of case which I have just mentioned.

That really is enough to dispose of the case. In my opinion, the appeal fails and should be dismissed with costs.

DU PARCQ L.J. I agree.

LEWIS J. I agree.

Appeal dismissed.

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v.
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Solicitors: *Solicitor of Inland Revenue; Hyde, Mahon & Pascall, for Wilkinson & Marshall, Newcastle-upon-Tyne.*

H. C. G.

1942
May, 12, 13.

BETTS *v.* PENGE URBAN DISTRICT COUNCIL.

Public health—Statutory nuisance—Removal by landlord of door and windows—Interference with personal comfort of tenant—"Prejudicial "to health"—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 92, *sub-s.* 1 (*a*).

The landlord of a flat, of which the rent was in arrear, made no application for possession or leave to distrain, but removed the front door and some of the window sashes, thereby interfering with the personal comfort of the occupiers:—

Held, that the distinction between public and private nuisances was immaterial to the question whether a "statutory nuisance" under s. 92, sub-s. 1 (*a*), of the Public Health Act, 1936, existed on the premises, and that it was sufficient, in order to sustain the conviction of the appellant for permitting a statutory nuisance on the premises, to prove that by his act or default they were in such a state as to interfere with the personal comfort of the occupiers, without necessarily being injurious to health.

Great Western Ry. Co. v. *Bishop* (1872) L. R. 7 Q. B. 550 distinguished; *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co., Ld.* (1882) 10 Q. B. D. 138 applied.

CASE stated by Kent justices.

A complaint was preferred by the respondents under the Public Health Act, 1936, against the appellant, alleging that on November 3, 1941, there existed by his act or default at the basement flat of No. 41 Oakfield Road, Penge, a statutory nuisance, in that the upper and lower glazed window-sashes of the centre opening of the front room bay window and the front door leading into the passage had been removed. The justices found that the statutory nuisance existed, ordered its abatement within four days, made an order prohibiting its recurrence, and fined the appellant 5*l*. with five guineas costs.

The following facts were proved or admitted: The appellant, who was the landlord of the flat, removed the window-sashes and door, and thereby interfered with the personal comfort

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of the occupiers of the flat. On November 3, 1941, the flat was occupied by Mrs. Edith Patterson and her two children, Mrs. Patterson having attorned tenant to the appellant. Mrs. Patterson's tenancy had been determined on August 15, 1941, by notice to quit, and arrears of rent were owing by her both on August 15 and on November 3, 1941. The appellant had not issued any summons for recovery of possession of the flat from Mrs. Patterson, nor made any application to the county court for leave to distrain for the arrears of rent.

The justices' attention was directed to the definition of "nuisance" in Stephen's Digest of Criminal Law, 7th ed., art. 255, and in Salmond on Torts, 9th ed., ch. VIII., and to *Jones* v. *Foley* (1) and *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co., Ld.* (2).

The justices, being of opinion that the removal of the window sashes and door constituted a statutory nuisance within the meaning of s. 92, sub-s. 1 (*a*), of the Public Health Act, 1936 (3), held that the appellant had been guilty of an offence punishable under s. 94 of that Act, and made the order stated above.

Baskerville for the appellant. Sect. 92, sub-s. 1 (*a*), of the Public Health Act, 1936, deals only with public nuisances, and what is in this case complained of is not a statutory nuisance within definition (*a*). A clear distinction has always been drawn between public and private nuisances. The former are a species of criminal offence; the latter are civil wrongs, actionable at law. The tenant in this case has in fact pursued her civil remedy and recovered damages against the landlord. The present prosecution is misconceived, and the respondents have proceeded under the wrong statute. What is here complained of is not a nuisance but a trespass,

(1) [1891] 1 Q. B. 730.

(2) (1882) 10 Q. B. D. 138.

(3) By the Public Health Act, 1936, s. 92, sub-s. 1: "Without "prejudice to the exercise by a "local authority of any other "powers vested in them by or "under this Act, the following "matters may, subject to the "provisions of this Part of this "Act, be dealt with summarily, "and are in this Part of this Act "referred to as 'statutory nuis-"'ances,' that is to say:—(*a*) any "premises in such a state as to "be prejudicial to health or a "nuisance; . . . ."

By s. 343, sub-s. 1: "In this "Act . . . . 'prejudicial to health' "means injurious, or likely to "cause injury, to health."

and a remedy for the resulting state of affairs is provided by the Housing Act, 1936 (see ss. 9, 10 and 11). If the legislature had intended that the Public Health Act, 1936, should cover both public and private nuisances there appears to be no reason why in the same session it should also have passed the Housing Act, 1936, dealing with private nuisances. Moreover, it is to be observed that in the Public Health Act the sanction is more drastic than under the Housing Act, and that while in the former statute the words are "prejudicial "to health or a nuisance," in the latter "unfit for human "habitation" only appear.

Waddy for the respondents. In 1872, in *Great Western Ry. Co.* v. *Bishop* (1) it was held that words almost identical with the definition of "prejudicial to health" in s. 343 covered both public and private nuisances: see per Cockburn C.J. and Hannen J. In *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co., Ld.* (2), it was expressly held that interference with personal comfort was sufficient to amount to a nuisance under the Public Health Act, 1875, if it might be injurious to health, without proof of actual injury to health.

VISCOUNT CALDECOTE C.J. The question has been raised whether the justices' finding must be taken to mean that the removal of the door and the window-sashes was an interference with the personal comfort of the occupiers of the flat and not prejudicial to health; or whether it is a finding that it was both an interference with the personal comfort of the occupiers of the flat and prejudicial to health. I think the justices have only found, as Mr. Baskerville has submitted, that it was an interference with the personal comfort of the occupiers of the flat, and I propose to deal with the case on that basis.

Two objections have been taken on behalf of the appellant; first that s. 92 only deals with public nuisances, and that this was only a private nuisance. It seems to me that the words of the Act are all that require to be considered on this point. The Act says that a "statutory nuisance," which is an artificial term, is "any premises in such a state as to be "prejudicial to health"—I stop there for the moment, leaving out the words "or a nuisance." In this case these premises might have been in such a state as to be prejudicial to health, in which case they would be a "statutory

(1) (1872) L. R. 7 Q. B. 550, 552, 553. (2) 10 Q. B. D. 138.

"nuisance"—the question of public nuisance or private nuisance not being material. It seems to me, therefore, impossible to say that s. 92 of the Act only deals with public nuisances. In my view, quite plainly, it can and should be read as dealing with private as well as public nuisances.

The more difficult question is whether a finding that the removal of the window-sashes "interfered with the personal "comfort of the occupiers of the flat," and that finding alone, is enough to justify the conclusion of the justices that it was a statutory nuisance. Two or three cases have been called to our attention on that point. The first is *Great Western Ry. Co.* v. *Bishop* (1), where a similar provision in the Nuisances Removal Act, 1855, was considered. In that case the relevant words of the statute were "any premises in "such a state as to be a nuisance or injurious to health." Those are practically the same words as we have to consider in the Public Health Act, 1936. There a railway bridge over the public highway was in a state which allowed water to drain from it and drip on to the highway. Cockburn C.J. deals with the statute in this way (2): "The Act speaks of "nuisances or things injurious to health, and I think that the "distinction taken by Mr. Lopes is the true one, that it was "intended for the benefit of public health or health generally, "to secure the means of abating things that were either matters "of public or private nuisance, of public nuisance as coming "within the word 'nuisance,' and private nuisance as coming "within the words 'injurious to health'". I pause there to observe that that is an authority, although it is said that it is only obiter, for the proposition (which I think is right) that the Act deals with private nuisances as well as with public nuisances. Then Cockburn C.J. goes on: "But "whether you regard public or private nuisance, still it was "intended that the powers of this Act should apply only when "the thing complained of was injurious to health." A little later on he says: "It is plain that the object was to protect "the public health and private health of individuals living "in towns, or in the neighbourhood of towns." His statement still stands, and at first sight it seems to be in favour of Mr. Baskerville's argument that the Act only applies when the thing complained of is injurious to health. The justices have not found that in this case. Cockburn C.J.'s judgment was concurred in by the other members of the court; Lush J.

(1) L. R. 7 Q. B. 550.

(2) Ibid. 552.

saying (1) that the word "nuisance" in the Act must be limited to "those wrongful acts spoken of by the statute, "viz. 'injuries to health'."

The next case is *Banbury Sanitary Authority* v. *Page* (2), where it was held by Grove, Lopes and Bowen JJ. that it was an offence under the Public Health Act, 1875, s. 47, "to "keep swine so as to be a 'nuisance' in the common law "meaning of the term. It is not necessary to such offence "that there should be any injury to health." That seems to throw some doubt upon the argument that *Great Western Ry. Co.* v. *Bishop* (1) is an authority for saying that it is necessary that there should be something injurious to health, to constitute a statutory nuisance.

In *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co., Ld.* (3) a new consideration appeared which had not appeared in *Great Western Ry. Co.* v. *Bishop* (1), namely, the personal comfort of persons as distinct from actual injuries to health. In that case an accumulation of cinders and ashes which had been caused by the act and default of the respondents was said to be a nuisance or injurious to health. For the appellants it was contended that it was not necessary to prove that the nuisance complained of was injurious to health; and that if the justices were satisfied that there was a nuisance caused by the effluvia, they ought to have convicted the respondents. That argument impressed Stephen J. He says about the *Great Western* case (1): "the particular nuisance "complained of was not only not injurious to health, but it "was not a nuisance that in any kind of way related to the "health, or even to the permanent comfort, of any of the "neighbours. It was a mere common law nuisance like the "non-repair of a highway." Then having introduced this consideration of the comfort of persons, not merely their health, he says on the next page, referring to the case of *Malton Board of Health* v. *Malton Manure Co., Ld.* (4): "The nuisance was injurious to health, because it was found "that the effluvia caused sick persons to become worse, but "I said in effect in my judgment that, even if the nuisance "were not shewn to be precisely injurious to health, yet if "shown to be injurious to personal comfort, and possibly "injurious to health, it would be exactly one of the nuisances "to which both the old and the new Acts would apply." Then

(1) L. R. 7 Q. B. 550, 553.
(2) (1881) 8 Q. B. D. 97.
(3) 10 Q. B. D. 138.
(4) (1879) 4 Ex D. 302.

a little lower down he says: "The natural sense of the words "seems to me the best one to apply in the present case, i.e., a "nuisance either interfering with personal comfort or injurious "to health."

In this case the justices have found that the removal of the window-sashes and the door was an interference with the personal comfort of the occupiers of the flat. On that they have found that it was a nuisance, and by reason of the language of s. 92 of the Public Health Act, 1936, it was a statutory nuisance. I think that *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co., Ld.* (1), is an authority on which the justices could properly come to their conclusion. That case has not been in any way overruled or, so far as I am aware, criticized. Indeed, it seems to be consistent with the whole scheme of Part III. of the Public Health Act. In particular, it seems consistent with s. 92, sub-s. 1 (*a*), which says in terms: "In such a state as to be prejudicial "to health"; and does not stop there, but goes on to say "or a nuisance." If a thing is an interference with the comfort of persons, it may well be a nuisance. Sect. 92 goes a little further, and makes it a statutory nuisance, so as to be capable of being remedied in a particular way under Part III. of the Act.

On both these grounds, I think that the appellant's contentions fail, and that this appeal should be dismissed.

HUMPHREYS J. I am of the same opinion. In effect the charge against the appellant was that he created, or permitted to exist, a statutory nuisance upon these premises. A statutory nuisance is defined as including "any premises in "such a state as to be prejudicial to health." If these premises were in such a state as to be prejudicial to health, and the appellant caused them to be, or allowed them to remain in that state, in my opinion it becomes unnecessary to consider whether they otherwise constituted a nuisance or not. At first I expressed the view that it was not quite clear whether the justices had found that the premises in question were in such a state as to be prejudicial to health; because what they have found is: "that the premises were in a state which "interfered with the personal comfort of the occupiers of the "flat." In stating their opinion on the law, founded upon their findings of fact, they said that they were of opinion that

(1) 10 Q. B. D. 138.

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the removal of the window-sashes and door constituted a "statutory nuisance." It is clear that the justices did not find that the premises were not in such a state as to be injurious to health. They thought it was sufficient for them to justify their statement of the law as they understood it, to find as a fact that the state of the premises interfered with the personal comfort of the occupiers of the flat.

The case to which my Lord referred, *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co., Ld.* (1), was cited to the justices, who apparently appreciated it, for they took the exact language used by Stephen J. in that case, and applied it to the facts of this case. I think they were perfectly right in so doing. I should be very sorry myself to differ from the view expressed by this court in a case which is to my mind precisely in point on this matter, and which, so far as I am aware, has never been doubted since it was decided in 1882. The result is that the justices found that which, according to Stephen J., justifies the conclusion that the premises are a statutory nuisance. I also agree with the observations of my Lord upon the question whether a statutory nuisance, under s. 92, includes a private nuisance as well as a public nuisance: but I prefer to base my judgment upon the matter which I have already dealt with. I agree in the result proposed by my Lord.

CASSELS J. On the grounds stated by my Lords, I am of the same opinion.

Appeal dismissed.

Solicitors for appellant: *James & Charles Dodd.*
Solicitor for respondents: *William G. Weller.*

(1) 10 Q. B. D. 138.

J. W. H.

1942
May 7, 14.

MEIGH *v.* WICKENDEN.

Factory Acts—Offence—Contravention of regulation—Unguarded machine—"Occupier"—Company—Debenture—Receiver and manager—Power to manage business—Agent of company—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 130, *sub-s.* 1; *s.* 133.

A debenture holder, acting under a debenture, appointed the appellant receiver and manager of a company which carried on business in a factory within the meaning of the Factories Act, 1937, "to manage and carry on the business of the company, to "take possession of, get in and collect the property and assets "hereby charged, and to sell, convert into money and realize the "same, and to convey the property sold in the name and on "behalf of the company." The debenture further provided: "Any receiver so appointed shall so far as the law allows be "deemed to be the agent of the company for all purposes and the "holder of this debenture shall not be under any liability for his "remuneration or otherwise." After the appellant, as receiver and manager, entered on the factory premises the business continued to be controlled by the directors of the company by day and by night, and the appellant, being an accountant with no knowledge of machines or technical factory affairs, attended the premises infrequently and conducted his receivership mainly by a clerk who attended at the offices of the company only during normal business hours in the daytime. An employee having been injured in consequence of a guard not being provided for a milling machine:—

Held, that the appellant was the occupier of the factory within the meaning of s. 130, sub-s. 1, and s. 133 of the Factories Act, 1937, and was, therefore, liable for a contravention of a regulation made under the Act directing the provision of guards for such machines.

CASE stated by justices.

At a court of summary jurisdiction sitting at Ealing, Middlesex, two informations were preferred by the respondent, Robert Membry Wickenden, an inspector of factories, against the appellant, Walter Thomas Meigh, for that he, on February 11, 1941, being the occupier of the Ceray Works, Perivale, Middlesex, a factory within the meaning of the Factories Act, 1937, did fail to provide a strong guard for the cutter of a milling machine, in consequence of which one Dale suffered bodily injury, contrary to reg. 3 of the Horizontal Milling Machine Regulations, 1928, and s. 130, sub-s. 1, and s. 133 of the Factories Act, 1937 (1).

On the hearing of the informations the following facts were proved or admitted: The business carried on at the factory was conducted by B. B. Technical Laboratories, Ld.,

(1) By Factories Act, 1937, s. 130, sub-s. 1: "In the event of "any contravention in . . . . a "factory of the provisions of this "Act, or of any regulation . . . . "made thereunder, the occupier ". . . . of the factory shall . . . . "be guilty of an offence."

By s. 133: "If any person ". . . . suffers any bodily injury, "in consequence of the occupier ". . . . of a factory having contravened any provision of this "Act or of any regulation . . . . "made thereunder, the occupier ". . . . of the factory shall . . . . "be liable to a fine . . . ."

a company incorporated under the Companies Acts, the directors of which at all material times were G. F. Brennan and J. P. Brennan. On January 22, 1941, Mary Ann Brennan gave notice to the Registrar of Companies that on that date she had appointed the appellant as receiver and manager of the company under the powers in that behalf contained in a debenture dated December 7, 1940, to secure 500*l.* and interest which had been registered with the registrar on December 26, 1940. The debenture provided by condition 11: "The holder of this debenture may at any time after the "principal moneys secured by this debenture shall have become "payable by any writing under his hand appoint a receiver of "the undertaking, property and assets hereby charged (with "power for such receiver, in addition to exercising the powers "conferred by the sections of the Law of Property Act, 1925, "hereinafter mentioned, to manage and carry on the business "of the company, to take possession of, get in and collect "the property and assets hereby charged, and to sell, convert "into money and realize the same, and to convey the property "sold in the name and on behalf of the company) . . . . Any "receiver so appointed shall so far as the law allows be deemed "to be the agent of the company for all purposes and the "holder of this debenture shall not be under any liability "for his remuneration or otherwise . . . . The foregoing "provisions shall take effect by way of variation and extension "of ss. 101 and 104 to 109 inclusive of the said Act, and the "provisions of those sections, and the powers conferred on a "mortgagee or receiver by those sections, as so varied and "extended, shall apply to and be exerciseable by any such "receiver so far as applicable, and s. 103 of the said Act shall "not apply." After the appellant, as receiver and manager, entered on the factory premises the business carried on thereat continued to be conducted and controlled by day and by night by the directors and the works manager. Dale, the maintenance engineer, was employed by the company and received his instructions from the directors. The appellant was an accountant and had no knowledge of machines or technical factory affairs. He attended the factory premises infrequently and conducted his receivership mainly by a clerk who attended at the offices of the company only during normal business hours in the daytime. It was found as a fact that in the course of his receivership the appellant was the agent of the company as manager of its business.

The justices were of opinion that, so far as it was a question of fact for their decision, the appellant was the occupier of the factory at the material time within the meaning of the Factories Act, 1937, s. 133, and they, therefore, held that the offences charged had been committed and fined the appellant.

Granville Sharp for appellant. The appellant was not, at the material time, the "occupier" of the factory within s. 130, sub-s. 1, and s. 133 of the Factories Act, 1937. The company was not dissolved by the appointment of the appellant as receiver and manager. It remained in existence, carried on its business, and continued as "occupier" of the factory. After the appointment of a receiver a company is still liable for the rent of the premises it occupies: *Hay* v. *Swedish & Norwegian Railway Co.* (1); Palmer's Company Precedents, 15th ed., vol. iii., p. 506. By the express terms of condition 11 of the debenture, the appellant, as receiver and manager, was merely the agent of the company, and the justices have found as a fact that he was only such an agent. A receiver and manager could only be liable for a contravention of the Factories Acts as an officer of the company under s. 130, sub-s. 5, of the Act, if there was evidence of consent, connivance, or neglect on his part in connection with an offence committed by the company. The position of a receiver appointed under a debenture is not the same as that of one appointed by the court. [He referred to *Parsons* v. *Sovereign Bank of Canada* (2); *Inland Revenue Commissioners* v. *Thompson* (3); *Ramsay* v. *Mackie* (4); *Moss Steamship Co.* v. *Whinney* (5); Palmer's Company Precedents, 15th ed., vol. iii., pp. 470, 475.]

Valentine Holmes for the respondent. The practice has been to prosecute the receiver and manager, and in one case where the company was prosecuted, it was successfully argued before the justices that the proper defendant was the receiver and manager. That case, however, did not come up to the Divisional Court. Although a receiver and manager appointed under condition 11 of the debenture is called the company's agent, he is not an agent in any true sense. He can command whereas an ordinary agent must obey, and he acts through the directors, who have no longer any powers except so far as he permits or authorizes them. If an inspector of factories required the directors to provide a guard for a machine, they must obtain the sanction of the receiver to the expenditure needed. The position of a receiver is described in Kerr on Receivers, 10th ed., p. 221. In *Moss Steamship Co.* v. *Whinney* (1) it was held that shipowners could not exercise against a receiver and manager a lien for past freight due from the company because he and not the company was the consignor of the goods which they sought to retain. *Parsons* v. *Sovereign Bank of Canada* (2) is not inconsistent with that. It only decided that where a contract was made by the company before the receiver's appointment, he could sue on it as agent for the company. The word " manager " in s. 130, sub-s. 5, obviously does not refer to a receiver and manager but to an ordinary officer of the company. Sect. 132 postulates that the occupier has power to remedy a defect. In such a case as the present the only person who could do so would be the receiver and manager.

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(1) (1892) 8 T. L. R. 775.

(2) [1913] A. C. 160, 171.

(3) [1937] 1 K. B. 290, 304.

(4) (1904) 7 F. 106.

(5) [1912] A. C. 254.

Sharp replied.

Cur. adv. vult.

1942. May 14. The following judgments were read.

VISCOUNT CALDECOTE C.J. This is a case stated for the opinion of the court arising out of a contravention of a provision of the Factory Act, 1937. Sect. 130 of the Act provides that in the event of any contravention of the provisions of the Act the occupier shall, subject as thereinafter provided in the Act, be guilty of an offence. By s. 152 of the Act " contravention " includes, in relation to any provision, a failure to comply with that provision. The findings of the justices make it plain that there was a contravention of the Act. The appellant was charged with an offence under s. 133 of the Act as being the occupier of the factory in which the offence took place. In the result the justices found that the offence charged had been committed and fined the appellant 5*l.* with costs. The question for our decision is whether the appellant was the occupier of the factory at the material time within the meaning of s. 133.

The occupier's responsibility under the Act does not depend on proof of personal blame or even on knowledge of the contravention. The policy of the Act seems to be to fasten

(1) [1912] A. C. 254.

(2) [1913] A. C. 160.

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responsibility, in the first instance, on the occupier. The occupier, however, may bring the person who is alleged to be " the actual offender " before the court, and if this person is found to have committed the offence, the occupier may be found not guilty: see s. 137. The Factories Act, 1937, is drastic in its provisions. It is clearly framed in such a way as to make it certain that someone can be found who can be convicted of an offence in the event of a contravention. The sole question for the court is whether the appellant is the occupier. There is no definition of " occupier " in the Act. The case stated refers to a Scottish decision, *Ramsay* v. *Mackie* (1), in which Lord Maclaren dealt with the meaning of the word " occupier." " While the language is wide," he said, " in order to prevent evasion, yet ' occupier ' plainly "means the person who runs the factory or warehouse, who "regulates and controls the work that is done there, and who "is responsible for the fulfilment of the provisions of the "Factory Act within it." This statement carries the matter very little, if any, further, and the question submitted must be decided apart from authority.

The contention of counsel for the appellant was that the company continued after as before the appellant's appointment as receiver and manager to be the occuiper of the factory and that the appellant was, as the case found, merely the agent of, and manager of the business of, the company. The contention for the respondent was that the appellant, by entering in pursuance of the exercise of the powers of condition 11 of the debenture, became the " occupier " within the meaning of s. 133 of the Act. The finding in the case that the appellant was the agent of the company as manager of its business was said, by counsel for the respondent, to be a finding of law and not of fact. I am inclined to agree with that view, but I see no reason to disagree with the finding as understood in the sense in which I read it. The provision in condition 11 of the debenture that : " Any receiver so appointed "shall so far as the law allows be deemed to be the agent "of the company for all purposes and the holder of this "debenture shall not be under any liability for his remuneration "or otherwise," which is a usual one in such debentures, has the effect of protecting the debenture holder from liability as mortgagee in possession or as principal: see Palmer's Company Precedents, 15th ed., vol. iii., p. 471, and cases there

(1) 7 F. 106, 109.

cited. Also, no doubt, this provision has the effect of making it clear that the receiver is to be paid by the company and not by the debenture holder. If, however, the finding that the appellant was the agent of the company as manager of its business is to be understood as meaning that the appellant acted under the directions of the company, that is to say, under the directions of the directors of the company, I disagree with the finding as an obvious misstatement of the legal position. I do not think that is what the justices intended to find, for the reason that it is not consistent with their finding that the appellant was occupier of the factory. He was appointed, not to receive directions from the directors, but to give directions. He might at any time remove them and appoint someone to take over their duties. He might himself perform those duties, if he had the necessary technical qualifications. It may, indeed, be said with accuracy, I think, that he took the place of the directors and was responsible in their stead for the management of the affairs and business of the company even while he permitted them to manage the business under him. No doubt, the company continued to exist, and, unless and until steps were taken to wind up the company's affairs and to liquidate the company, it would continue to be answerable for engagements into which the company had entered before the appointment of the appellant as receiver and manager.

Such a case is *Parsons* v. *Sovereign Bank of Canada* (1). There the bank, who were the respondents, sued as assignees from receivers appointed in a debenture holder's action of a company not in liquidation to recover the price of goods supplied by the receivers to the appellants under contracts made before the receivers' appointment but subsequently declared by the receivers to be cancelled. It was held in the Privy Council, that the appellants, the defendants in the action, were entitled to set off against the prices of the goods for which they were sued damages for the breach of the contracts. Lord Haldane L.C. said (2): "The receivers and "managers were exercising the powers of continuing the "business given to them under the orders of the court by "taking no actual steps to determine the relations between "the company and the appellants . . . . the company remained "in legal existence, and so did its contracts, until put an end "to otherwise." So, also, in the present case I have no doubt

(1) [1913] A. C. 160.

(2) Ibid. 171.

that the company continued to exist at all material times, but that seems to me to be quite undecisive on the question we have to consider. *Moss Steamship Co.* v. *Whinney* (1) was another case to which we were referred of the appointment by the court in a debenture holder's action of a receiver and manager of the business of a company. Lord Loreburn L.C. made a similar statement to that made by Lord Haldane, when he said (2): "Nothing special is to be found in that order. Its "effect in law was that the company still remained a living "person, but was disabled from conducting its business, of "which the entire conduct passed into the hands of "Mr. Whinney. Mr. Whinney did not close down the business, "but continued it."

In the present case the appointment of the appellant as receiver and manager was an exercise of powers in the debenture and in pursuance of the powers contained in the Law of Property Act, 1925, and not by the court in a debenture holder's action. A distinction was drawn between a case of this sort and a case in which the appointment was made by the court, as in *Moss Steamship Co.* v. *Whinney* (1). In that case the following passage is to be found in Lord Loreburn's opinion (3): "I agree . . . that the company was still alive "and its business was being still carried on by Mr. Whinney, "but he was not carrying on as the company's agent. He "superseded the company, and the transactions upon which "he entered in carrying on the old business were his trans-"actions, upon which he was personally liable." Lord Halsbury expressed the view (4) that the court "practically "removes the conduct and guidance of the undertaking from "the directors appointed by the company and places it in "the hands of a manager and receiver, who thereupon "absolutely supersedes the company itself, which becomes "incapable of making any contract on its own behalf or "exercising any control over any part of its property or "assets." Lord Atkinson, in a passage generally quoted, said (5): "This appointment of a receiver and manager over "the assets and business of a company does not dissolve or "annihilate the company, any more than the taking possession "by the mortgagee of the fee of land let to tenants annihilates "the mortgagor. Both continue to exist; but it entirely

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(1) [1912] A. C. 254.
(2) Ibid. 257.
(3) Ibid. 259.
(4) Ibid. 260.
(5) Ibid. 263.

"supersedes the company in the conduct of its business, "deprives it of all power to enter into contracts in relation "to that business, or to sell, pledge, or otherwise dispose of "the property put into the possession, or under the control "of the receiver and manager. Its powers in these respects "are entirely in abeyance."

We were invited to say that the opinions of the noble lords in *Moss Steamship Co.* v. *Whinney* (1) were only made with reference to the powers and position of a receiver and manager appointed by the court and that they did not apply to receivers and managers appointed without the aid of the court. In answer to this argument Mr. Holmes, on behalf of the respondent, contended that the position of the appellant as manager was no whit different in any material respect from the position of a manager appointed by the court. I do not feel called on to discuss further, or to express my opinion on, these opposing contentions, for the simple reason that they seem to me to lie outside the question raised. The way in which the appellant's argument can be put most favourably is that the company continued to exist and to be the occupier of the premises, the only difference made by the appointment of the appellant as manager being that he took the place of the directors in the conduct of the business of the company. The corollary of this argument was that, just as a director would not be subject to conviction as being the occupier of the premises, so the receiver and manager could not be made liable in that capacity. Notwithstanding the force of this argument, this case must, in my judgment, be decided by giving effect to the results which, I think, flow from the provisions of condition 11 of the debenture, in pursuance of which the appellant was appointed receiver and manager. He was appointed " to "manage and carry on the business of the company, to take " possession of, get in and collect property and assets " charged by the debenture. I must assume that he did what he was appointed to do, which was something very different from what a director had to do. He was not in the same position as the directors, for instance, in so far as his duty to take possession of the property of the company was concerned. He was complete master of the affairs of the company. He had absolute and complete power to manage the property of which he took possession, including the factory, with a possible view to its realization, if necessary, in order to secure the debt owed to the

(1) [1912] A. C. 254.

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debenture holder. As between the appellant and the company, therefore, I think the appellant was the person in possession and it follows, in my judgment, that he was properly convicted as occupier. For these reasons I think this appeal must be dismissed.

HUMPHREYS J. asks me to say that he agrees with the judgment which I have just delivered.

CASSELS J. I agree.

Appeal dismissed.

Solicitors for appellant: *Nordon & Co.*
Solicitors for respondent: *Treasury Solicitor.*

G. F. L. B.

ictum of LORD GREENE, M.R., at
.174, *considered.* HENLEY *v.* MURRAY.
950] 1 All E.R. 908.

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May 6, 7, 18.

Revenue—Income tax—Managing director—Agreement releasing pension rights and accepting reduced salary for the future—Lump sum consideration—Entire lump sum taxable under sch. E—Income Tax Act, 1918 (8 & 9 *Geo.* 5, c. 40), *sch. E.*

Under an agreement entered into in 1937 T. was employed by a company as its managing director at a salary of 6000*l.* a year with a right on his ceasing to be employed by the company to receive a pension of 4000*l.* a year for ten years. On April 6, 1938, an agreement was come to between T. and the company under which T. in cl. 1 released the company from the obligation to pay this pension, and in cl. 2 agreed to serve as managing director at the reduced salary of 2000*l.* a year. In cl. 3 the company agreed " in consideration of the premises " to pay T. the sum of 40,000*l.* by two equal instalments payable on April 6, 1938, and April 6, 1939 :—

Held, by the Court of Appeal (Lord Greene M.R. and Goddard L.J., MacKinnon L.J. dissenting), that T. was assessable to income tax under sch. E in respect of the two sums of 20,000*l.*, although if the agreement had provided for the payment of a separate sum in commutation of the pension rights that sum would not have been taxable under sch. E.

Per MacKinnon L.J. In view of the decision of the House of Lords in *Hunter* v. *Dewhurst* (1932) 16 Tax Cas. 605, 637, a payment in commutation of pension rights was not taxable under sch. E and the case should be referred to the Special Commissioners to ascertain how much of the two sums of 20,000*l.* was paid in respect of the reduction of salary, with a direction that the amount so found was alone taxable under sch. E.

Appeal from Lawrence J.

In 1917, Vernon James Tilley (hereinafter called the appellant) was appointed a director of Stevenson & Howell, Ld. (hereinafter called the company). In 1921 he invented a secret process and entered into an agreement by which he granted its exclusive use to the company on the terms therein mentioned. In November, 1929, the appellant was appointed a joint managing director of the company and received 300*l.* a year as director and a salary of 1800*l.* a year. The salary was later increased to 2000*l.* a year and the director's fee to 660*l.* On June 28, 1937, the company entered into a new agreement with the appellant by which, after putting an end to the liability of the company to pay the appellant sums in respect of the secret process under the 1921 agreement, it was agreed in cls. 2 and 3:

"2. In consideration of the premises the company hereby "agree to pay to Mr. Tilley as managing director of the "company a salary of 4000*l.* per annum, additional to the "salary of 2000*l.* above created and to any other emoluments "to which Mr. Tilley may be otherwise entitled as such "managing director."

"3. In the event of Mr. Tilley ceasing from any cause "whatsoever to be managing director of the company, the "company agrees to pay him as and from the date of cessation "a pension of 4000*l.* per annum for ten years reckoned from "the same date."

Early in 1938 the directors of the company suggested that the company should be relieved from the obligation to pay a ten years' pension and the above increase of salary. The appellant's accountants went into the question of a reasonable payment for release from this liability, and eventually it was agreed that 40,000*l.* should be paid in two sums of 20,000*l.* each on April 6, 1938, and April 6, 1939. An agreement for giving affect to this arrangement was entered into on April 6, 1938. Clauses 1, 2 and 3 of this agreement were as follows:

"1. Mr. Tilley hereby releases the company from its "obligation under cl. 3 of the said agreement to pay to him "a pension of 4000*l.* per annum for ten years from the date "of his ceasing to be managing director of the company."

"2. Mr. Tilley hereby agrees to serve the company as "managing director as from the date of these presents at a "reduced salary of 2000*l.* per annum."

"3. In consideration of the premises the company will "pay to Mr. Tilley the sum of 40,000*l.* by two equal instalments, "the first of which shall be paid on the sixth day of April, 1938, "and the second on the sixth day of April, 1939."

Neither this agreement nor those of 1937 and 1921 contained any provision that the appellant should serve the company for any particular period.

The appellant having been assessed to income tax under sch. E for the year 1939/40 in the sum of 40,000*l.* appealed to the Commissioners for the Special Purposes of the Income Tax Acts. The Special Commissioners held that "the "payment of 40,000*l.* was not made to the appellant as "remuneration for services rendered or to be rendered by "him in his office as a managing director of the company. "It was a payment in commutation of the company's liability "under the 1937 agreement to pay him a pension on his "ceasing to hold the office and an increase of salary during "the continuance of his tenure. It was not income in the "hands of the appellant." Lawrence J. allowed an appeal by the Crown from this decision holding that *Hunter* v. *Dewhurst* (1) was distinguishable. A sum paid in consideration of an agreement to serve at a reduced salary was clearly a profit from the office. Part of the sum was no doubt payable in commutation of the ten years' pension, but as that pension would have been assessable under sch. E by virtue of s. 17 of the Finance Act, 1932, the sum payable in commutation of it was, in his opinion, assessable under sch. E. If it were not so, any prospective pensioner could by agreement with the prospective payer of the pension defeat the Crown's right to income tax. The reasoning in *Short Bros., Ld.* v. *Inland Revenue Commissioners* (2) supported this view. There must, however, be two assessments on the sum of 20,000*l.* each for the years 1938/39 and 1939/40.

The appellant appealed.

Tucker K.C. and *Terence Donovan* for the appellant. This case turns on the construction of r. 1 of the rules applicable to sch. E of the Finance Act, 1918. The sum of 40,000*l.* was paid to the appellant partly in return for his accepting a less salary for an indefinite number of years and partly as commutation of certain pension rights. Such a payment is not assessable to income tax. The payment to him in consideration of his foregoing future remuneration is not a

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(1) (1932) 16 Tax Cas. 605, 637. (2) (1927) 12 Tax Cas. 955.

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profit of his employment within r. 1, and still less is the amount paid in respect of the commutation of his pension rights: *Glenboig Union Fireclay Co., Ld.* v. *Inland Revenue Commissioners* (1), *Chibbett* v. *Joseph Robinson & Sons* (2) and *Cameron* v. *Prendergast* (3). *Hunter* v. *Dewhurst* (4), where the circumstances were very similar to those in the present case, is a direct authority for the proposition that at least the portion of the lump sum attributable to the commutation of pension rights is not assessable to income tax, and that decision is still law. To make the appellant assessable to income tax, the case must come within r. 1 of the rules applicable to sch. E, and it does not do so.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. The sum of 40,000*l.* agreed to be paid in two instalments is clearly taxable under sch. E. *Cameron* v. *Prendergast* (3) shows that sums paid to a director by his company are taxable. They are paid for his services, past, present or future, for a board of directors cannot make a gift out of the company's assets to one of its members. Further, no sum paid to a director in respect of his office can be capital and it can make no difference that a lump sum is paid in one year in lieu of remuneration over a number of years. *Hunter* v. *Dewhurst* (4) must be considered in the light of *Cameron* v. *Prendergast* (3). One kind of remuneration has been substituted for another. This is equally true when the lump sum is paid in commutation of pension rights. A pension is deferred remuneration. [They referred to *Allen* v. *Trehearne* (5).] A lump sum payment in respect of an ordinary annuity might be capital; but a lump sum payment in respect of future or delayed remuneration is still remuneration. The position of a pensioner is different from that of a person in employment, though s. 18 of the Finance Act, 1922, brought a pensioner within sch. E for the purposes of income tax, just as a pensioner in respect of a State office had always been taxed under sch. E. The facts in *Hunter* v. *Dewhurst* (4) were very special and in *Cameron* v. *Prendergast* (3) the House of Lords accepted the view that it was very difficult to extract any clear principle from it. *Chibbett* v. *Joseph Robinson & Sons* (2) arose under Sch. D and not Sch. E, and it has little bearing on the present case. *Hunter* v. *Dewhurst* (4) is distinguishable from the present case. There

(1) (1922) 12 Tax Cas. 427.
(2) (1924) 9 Tax Cas. 48.
(3) [1940] A. C. 549.
(4) 16 Tax Cas. 605.
(5) [1938] 2 K. B. 464.

is here a single agreement for a payment in respect of a reduction of salary and the commutation of pension rights, and it cannot be treated as two separate agreements in an attempt to treat the payment so far as it is in commutation of pension rights as having nothing to do with remuneration.

Tucker K.C. in reply. The ratio decidendi of *Hunter* v. *Dewhurst* (1) is directly applicable to the present case, and it shows that so far as the sum of 40,000*l.* is attributed to the commutation of pension rights it is not a profit arising from the employment so as to be taxable under sch. E. [He also referred to *Jones* v. *South West Lancashire Coal Owners' Association, Ld.* (2) and *Cull* v. *Inland Revenue Commissioners* (3).]

Cur. adv. vult.

1942. May 18. LORD GREENE M.R. read the following judgment. As will be seen, I agree with the conclusion of Lawrence J., but I respectfully dissent from his view that a sum paid in commutation of a pension is necessarily assessable under sch. E. The case of *Short Bros., Ld.* v. *Inland Revenue Commissioners* (4) does not, in my opinion, support his proposition. Indeed, the Attorney-General on behalf of the Crown did not attempt to support this part of the reasoning of Lawrence J. He preferred to argue that the pension was deferred remuneration and that the acceptance during the service of a sum in commutation of it was the acceptance of present, in place of deferred, remuneration.

If the agreement of 1938 had dealt with nothing but the appellant's salary as managing director, reducing the annual amount and providing for payment of a lump sum in consideration of his acceptance of the reduction, there would, in my opinion, have been no difficulty in the case. If a man agrees to serve in consideration of a lump sum and no periodical salary or a small periodical salary, that lump sum is just as much remuneration and taxable as such as a periodical salary or a larger periodical salary would have been: *Cameron* v. *Prendergast* (5). Indeed, the only real argument that was presented on behalf of the appellant on this aspect of the case consisted of an endeavour to draw a distinction between a lump sum paid at the beginning of the service and a sum paid,

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(1) 16 Tax Cas. 605.
(2) [1927] A. C. 827.
(3) [1940] A. C. 51.
(4) 12 Tax Cas. 955.
(5) [1940] A. C. 549.

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as in the present case, in consideration of an agreement to continue to serve for a reduced salary. There is no substance in this distinction. If a man who is serving at a salary of 1000*l.* a year agrees to serve for a reduced salary in consideration of a lump sum, he is merely commuting his salary and a sum so accepted in commutation of salary can in its nature be nothing but salary. The commutation merely substitutes one form of remuneration for another. It is in effect remuneration payable in advance, and it is quite fallacious to speak of it as a capital payment. Indeed, I am unable to understand how a sum paid as remuneration can ever be capital in the sense that it escapes taxation, since remuneration as such is the subject matter of tax under sch. E, whatever form it takes. The analogy of cases such as the sale by an annuitant of his annuity for a lump sum is a false one, since the quality of remuneration is absent from the payment.

The real difficulty in the case arises by the introduction into the agreement of the provisions relating to the pension. If the agreement had merely provided for the surrender of the pension in consideration of a present payment, with no reference to or connection with present or future services, I do not think that the sum received would have been taxable under sch. E, since it would not have been remuneration or salary for services. It would have been nothing more nor less than commutation of a pension and a pension is in itself a distinct taxable subject-matter. It was admitted by the Attorney-General that a sum received in commutation of a pension effected after the termination of the service is not taxable. But he maintained that the case is different where the commutation takes place during the continuation of the service and that a sum paid then must necessarily be regarded as remuneration for services rendered and to be rendered. I do not think that this view is correct. It would, of course, be possible for an employee to agree to give up his future pension rights in consideration of a present addition to his salary and in that case the addition would be remuneration and taxable as such notwithstanding that it originated in a surrender of pension rights. The question whether a sum received in consideration of the surrender of future pension rights is or is not remuneration must, as it appears to me, depend upon the true construction of the agreement by which the transaction is effected. If the sum received is by way of an addition to remuneration, in the form either of an increase in periodical salary or of a lump sum, it is taxable; if it is not so received, but is merely paid by way of commutation of a future pension without reference to or connection with the service, it would not, I think, be taxable. The same result would, I think, have followed in the present case if the agreement had been framed in two distinct parts, one an agreement to serve at a reduced salary in consideration of x*l.* the other an agreement to give up the pension rights in consideration of y*l.* In that case the sum y*l.* could not, as it appears to me, have been described as remuneration for services.

It was argued on behalf of the appellant that if the whole 40,000*l.* does not escape taxation, it ought to be regarded as referable in part to the acceptance of a reduced salary and in part to a commutation of future pension rights and apportioned accordingly. I was impressed by this argument, but on consideration I am unable to accept it. The question, as I see it, turns upon the actual language of the agreement. The parties themselves have made no attempt to apportion the 40,000*l.*, no doubt because of the practical difficulty of doing so when the commencing date of the pension was unascertainable and an actuarial valuation accordingly impossible. Instead, they have chosen to treat the 40,000*l.* as an indivisible sum paid " in consideration of the premises." The consideration is thus agreed to be an entire non-severable consideration, the whole of which is referable to the agreement to serve at a reduced salary just as much as to the agreement to give up the pension rights. It may well be that an apportionment might properly be made if, for example, a lump sum were paid in consideration of an agreement to serve and of the sale of a piece of land by the employee to his employer. In such a case the land would be capable of valuation and the parties must be presumed to have known it and the agreement for sale would have no connection with the agreement to serve. But here one of the considerations for the entire sum is expressed to be the agreement to serve and as the parties have so agreed I do not think that an apportionment is permissible since it would involve re-writing the contract.

It was argued by Mr. Tucker on behalf of the appellant that the present case is covered by the decision in *Hunter* v. *Dewhurst* (1). I did not obtain any real assistance from the elaborate discussion of that decision which took place before us. It was a very special case and the contract did not contain the peculiarities of the contract in the present case to which I have referred. As I have said, this case, in my opinion, falls to be decided on the terms of the bargain which the parties have themselves made, which is, in essential respects, different to that in *Dewhurst's* case (1) and Mr. Tucker's argument that the facts of the present case are in all essentials indistinguishable from those in *Dewhurst's* case (1) is one that I cannot accept. I would dismiss the appeal.

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(1) 16 Tax Cas. 605, 637.

MacKinnon L.J. Lawrence J. has held that the appellant is liable to pay income tax under sch. E of the Finance Act, 1918, upon the 20,000*l.* paid to him by the company on April 6, 1938, and upon the 20,000*l.* so paid on April 6, 1939. In other words, each of these sums was an "annuity, pension "or stipend . . . in respect of . . . salaries, fees, wages, "perquisites or profits . . . for the year of assessment."

The Special Case sets out the agreements of December 19, 1921, and of June 28, 1937. I need only remark of the latter that it is obvious that the provision in it for the payment of 4000*l.* a year for ten years from the date of Mr. Tilley's ceasing to be a director involves a nice question of construction, namely, what, if any, are the rights of his executors or administrators if Mr. Tilley should die (*a*) while he is still managing director, or (*b*) after he has ceased to be managing director, but when only some of the annual sums of 4000*l.* have been paid?

The agreement of 1938 provided (1.) that the company should be released from the obligation to pay the 4000*l.* a year "pension" for ten years; (2.) that Mr. Tilley should serve the company as managing director at a salary of 2000*l.* a year instead of 6000*l.*; no period for such service is fixed, so presumably it would be for a reasonable time; and (3.) that the company should pay him 20,000*l.* on April 6, 1938, and 20,000*l.* on April 6, 1939. The date "April 6" is perhaps not without significance in a case about income tax. The problem is whether these two sums of 20,000*l.* are taxable in the two years of receipt under sch. E. If I were not assisted or embarrassed, by decisions of the House of Lords which are reported, I should think the answer was "Yes," as was held by Lawrence J.

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(1) 16 Tax Cas. 605, 637.

Each 20,000*l.* must have been paid partly in consideration of Mr. Tilley accepting for the future 2000*l.* a year salary in place of the 6000*l.* a year he was entitled to under the 1937 agreement, and partly in consideration of his releasing the company from the obligation under that agreement to pay him 4000*l.* a year for ten years. As regards the first sort of consideration, if a servant were entitled to 10*l.* a week, and on April 6 he agrees, in consideration of 520*l.* paid down to serve for a year for nothing, the 520*l.* would pretty clearly be an annual receipt within sch. E. So if a servant has an annual salary of 2000*l.* and in consideration of 20,000*l.* paid down he agrees to serve for ten years for nothing. And if, as here, he is entitled to be paid 6000*l.* a year for an unspecified time, and in consideration of x*l.* paid down he agrees to serve for a reasonable time for 2000*l.* a year instead of 6000*l.* a year, I should think the x*l.* would be in the same position.

So far as each 20,000*l.* was in consideration of the surrender or abolition of the right to the "pension" in futuro, the position may not be so clear. No doubt if a man had, under an endowment policy, a right to be paid x*l.* a year by an insurance company and he sold or surrendered this right to the insurance company for a lump sum, that lump sum would not be taxable under sch. E. But why would it not be so? Not, I think, from any characterization of the sum as "capital" rather than "income," but because the annual sum he was to receive, and was surrendering, was not an "annuity, stipend "or pension . . . . in respect of . . . . salaries, fees, wages or "profits." And that being so, the lump sum received by way of commutation could not be within that category. The question, as I see it, is whether the so-called "pension" is within that category, that is, payment by way of salary or wages for services rendered. If it is, then I should think the lump sum payable in praesenti for its satisfaction is also within that category.

If the agreement of 1937 had remained in force, and the ten sums of 4000*l.* had been paid, I should think each of them, in its year of receipt, would be taxable under sch. E as an "annuity, stipend or pension . . . in respect of . . . . "salaries, fees, wages or profits." Each would be in effect deferred remuneration for services rendered in the past. And if that be so, I should think that the lump sum agreed to be paid in advance in satisfaction or commutation of such deferred remuneration would also be within sch. E, This, as I have said, would be my view, if there were no reported cases to assist, or perhaps embarrass, me. But there are two such cases: *Hunter* v. *Dewhurst* (1) and *Cameron* v. *Prendergast* (2). Both are decisions of the House of Lords. The former was decided by three votes to two; the latter was the unanimous decision of five noble lords, of whom none were participants in the former.

So far as the two sums of 20,000*l.* were paid in consideration of Mr. Tilley agreeing to serve for 2000*l.* a year in place of 6000*l.* a year, the decision in *Cameron* v. *Prendergast* (2) seems clear authority that the amount so paid is taxable under sch. E. It is to be observed that Cameron, like Tilley in this case, did not agree so to serve for any fixed period of time. But so far as the two sums of 20,000*l.* in this case were paid in consideration of the surrender of the prospective right to the 4000*l.* a year pension, the decision in *Hunter* v. *Dewhurst* (1) seems to me to make it very difficult, if not impossible, to hold that that part of the 40,000*l.* is taxable under sch. E, for I cannot think that there is any essential difference between the sum which Dewhurst would have been entitled to under art. 109, and the sums which Tilley would have been entitled to under the agreement of 1937. Dewhurst would have got a lump sum and Tilley would have got ten annual payments. But I do not see how that difference can alter the nature of their respective gains; and if a prepayment in satisfaction of Dewhurst's prospective right was not within sch. E, I have great difficulty in seeing how the prepayment in satisfaction of Tilley's prospective right can be.

If a single payment has been made for two sorts of consideration, one of which does make part of the sum taxable, while the other does not, the commissioners would have to ascertain how much of the total sum fell within each category. Suppose, for example, a director received 10,000*l.* from his company; it is found to have been paid under a resolution of the Board "that Mr. A. be paid 10,000*l.* in satisfaction of his claims "(*a*) for his fees for last year as a director, and (*b*) in payment "for his Patent No. — which he has assigned to the company." Obviously the commissioners would have to analyse the 10,000*l.* and find how much was payable under (*a*), and therefore was taxable. In these circumstances I should be inclined to think that this case must go back to the commissioners

(1) 16 Tax Cas. 605, 637.

(2) [1940] A. C. 549.

for them to find how much of the two sums of 20,000*l.* was paid in consideration of the reduction of his salary (with a direction that the sum so found is taxable under sch. E) and how much was paid in consideration of the surrender of his right to the 4000*l.* a year "pension" (which sum would not be so taxable). I realize that this would be a difficult problem, by reason of (*a*) the doubtful effect of Mr. Tilley's death, which I mentioned above, and (*b*) that the agreement of 1938 fixes no period for his service at the reduced salary. But if the law requires the commissioners to ascertain a fact I doubt if the difficulty of performing their task can relieve them of the duty.

My own inclination, therefore, is to think that the case ought to be sent back to the commissioners in this way. But I can pretend to no disappointment at finding that my brethren think that this view is incorrect, and that this appeal should be dismissed, for that is the result I should certainly have arrived at upon my own view of the law if I were happily oblivious of the existence of *Hunter* v. *Dewhurst's* case (1) and free from the constraint of attempting loyally to follow it.

GODDARD L.J. In my opinion the question in this case depends for its solution on the true meaning and effect of the agreement of April 6, 1938. It has now been decided by the House of Lords in *Cameron* v. *Prendergast* (2) that if a lump sum is paid to a director to induce him to continue to serve the company either for no salary or at a reduced rate of salary that payment is a profit of his office and is taxable as income. It is as though, instead of agreeing to serve, say, for five years at 1000*l.* per annum he agreed to serve for five years for one payment of 5000*l.* If, however, a director is entitled to receive on the termination of his office a fixed sum or a pension and he compromises that right by acceptance of a smaller sum, then *Hunter* v. *Dewhurst* (1) decides that the sum he receives is not income, nor, according to the view expressed by Lord Atkin in that case, is it to be regarded as received under or from the contract of employment. In the present case Mr. Tilley was, under the agreement of June 28, 1937, entitled to a total salary of 6000*l.* while he served as managing director, and to a pension of 4000*l.* for ten years payable from the date when he ceased to hold his office. The agreement contained no provision as to the period for which

(1) 16 Tax Cas. 605, 637.

(2) [1940] A. C. 549.

Goddard L.J.

he was to serve as managing director; the appointment could be determined by either side at any time, though presumably only upon reasonable notice. By the agreement of 1938 Mr. Tilley, in consideration of 40,000*l.*, to be paid in two instalments, released the company from its obligation to pay him a pension and agreed to serve the company from the date of the agreement at a reduced salary of 2000*l.* Again, no period was fixed during which he was to serve. In my opinion, had the agreement been one under which Mr. Tilley agreed to commute his pension for x*l.* and also to accept a reduced salary in consideration of a payment of a lump sum, on the authority of the cases above referred to, the result would have been that the sum representing the commutation of the pension would not have attracted tax, while that which represented or was taken in lieu of the larger salary would have been taxable. But that is not, in my opinion, the true result of the agreement. The consideration is entire, and Mr. Tilley covenants to continue to serve the company for 40,000*l.* plus 2000*l.* a year, instead of 6000*l.* per annum plus the prospect of a pension. I am, therefore, unable to avoid the conclusion that the 40,000*l.* was remuneration for serving as a director and I do not see that remuneration can ever be capital. There was, as it seems to me, a very good reason why the sum was not allocated partly to the reduction in salary and partly to the commutation of pension. As no one could say when the pension would become payable, it would be impossible to calculate its present value, apart, moreover, from the question that might arise on the construction of the clause granting the pension, whether, for instance, it would enure to the benefit of Mr. Tilley's estate if he died before ten years had elapsed or had died while he was still in office. There is one point, however, on which I am not sure that I fully understand the judgment of Lawrence J. If he meant that, whenever a pensioner commutes a pension, the sum received by way of commutation is taxable as income, as at present advised I do not agree with him, nor am I able to see that it makes any difference whether the commutation takes place before or after the pension has become payable. Sch. E charges pensions and annuities as specific things in addition to charging profits arising from office, and if a commuted pension or annuity were taxable as income in the year that the sum was received, I cannot understand why it should make any difference whether the calculation and payment takes place while the pensioner is still in the service of the grantor or not. Nor does it seem to me to be right to say, as the Attorney-General submitted, that a pension must be deferred remuneration. Whether it is paid as a matter of contract or voluntarily it may be a reward for or an inducement to render long service. For instance, an employer may pay all his clerks of a certain grade 5*l.* a week and be willing to pay no more. If he promises a pension of 2*l.* a week after thirty years' service I do not see that this would be deferred pay, but if the pension were a term of their employment it would be an inducement to them to remain in his employment, or if paid voluntarily, a recognition of long and faithful service. I agree with the Master of the Rolls that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *R. G. Percival; Solicitor of Inland Revenue.*

H. C. G.

THOMAS *v.* KENSINGTON.

1942
May 11.

Vendor and purchaser—Contract for sale of land—Damages—Mortgage to knowledge of purchaser—Failure to complete, as mortgage not redeemed—Loss of bargain.

Where a vendor fails to complete a contract for the sale of real property owing to the fact that there remains a mortgage on the property, the case is not one where the failure is due to a defect in the vendor's title and the liability to the purchaser is not limited to the costs of investigating title, but the purchaser is entitled to damages for loss of bargain, and this is so, although the purchaser knew, when he entered into the contract, that the land was mortgaged.

In re Daniel. Daniel v. *Vassall* [1917] 2 Ch. 405, followed.

ACTION tried by Stable J. without a jury.

On December 24, 1937, the plaintiff lent to the defendant the sum of 300*l.* for which he took from the defendant a promissory note payable on March 31, 1938, for the sum of 330*l.* On the same date the defendant signed the following agreement: "In consideration of your having to-day advanced "to me the sum of 300*l.* in respect whereof I have given you a "promissory note to March 31, 1938, for 330*l.*, should I make "default in payment of the said amount of 330*l.* on the date "mentioned, then I hereby give you the option of accepting

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Reported by C. G. Moran, Esq., Barrister-at-Law.

"in full and complete settlement of my indebtedness to you "upon the said promissory note, or in any way in connection "therewith, one acre of the land known as St. George's Hill "House, Weybridge, at present belonging to me, such acre "to be selected by me, but to have suitable frontage of not "less than ninety feet." On the date when the promissory note and this agreement were signed the plaintiff knew that the land was mortgaged to Barclays Bank. At a date subsequent to December 24, 1937, and before March 31, 1938, the defendant granted to his solicitor a second mortgage on the land.

The defendant did not pay the promissory note and on September 14, 1938, the plaintiff's solicitors wrote to the defendant informing him that the plaintiff wished to exercise the option and calling on him to select the "one acre" in conformity with his agreement. The defendant failed to do so and on June 13, 1940, the plaintiff began this action claiming damages for the breach of the agreement.

At the trial it was proved that the two mortgages were still subsisting and there was no evidence that the defendant had made any effort to persuade the mortgagees to release an acre from their securities. It was admitted that the defendant had a title to the land subject to the mortgages.

W. A. L. Raeburn for the plaintiff.
F. C. Watmough for the defendant.

STABLE J. (having found for the plaintiff on the issue of liability, continued, on the issue as to damages): The defendant also claimed that this was not a case in which any damage had in fact been sustained or in which, if there were damage, it could be recovered by the plaintiff. I am aware that where a contract for the sale of land is not completed, because the vendor cannot make a title, the remedy provided by the courts does not include the award of general damages for the loss of the bargain: *Flureau* v. *Thornhill* (1) and *Bain* v. *Fothergill* (2). But this is not a case where there was a defect in the defendant's title.

The defendant has indicated—I do not say that he has satisfied me—that the reason why an acre out of this property was not selected by him for the plaintiff was because the land was mortgaged to Barclays Bank, and we know that the

(1) (1766) 2 W. Bl. 1078. (2) (1874) L. R. 7 H. L. 158.

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defendant granted a second mortgage of this land to his solicitor after December 24, 1937. In my view, the reason why the plaintiff did not receive his acre of land was because the defendant was unable to pay off the charge to the bank or found it inconvenient or did not want to do so. I do not know what was the defendant's financial position, but whether he could or could not pay off these mortgages seems to me to be immaterial.

In *In re Daniel. Daniel* v. *Vassall* (1), a testator had agreed to sell real property which, with other property, was subject to one mortgage. After his death the title was accepted by the purchaser; but the mortgagees refused to release the property sold from this mortgage and the executors had not enough funds from the testator's estate for redemption of the mortgage. It was held by Sargant J. that the liability to the purchasers was not limited to the costs of investigating title, but that they were entitled to general damages for loss of bargain. Sargant J. said: (2): "That the present case is not within "the exact terms of the decision in *Flureau* v. *Thornhill* (3) "is clear, for that decision merely covers cases in which the "incapacity of the vendor arises from a defect in his title, "while here the incapacity is due, not to any defect in title, "but to the refusal of the mortgagees to release and to the "pecuniary inability of the testator and his estate to pay the "mortgagees off." There was no evidence in the case before me that any effort was made by the defendant to persuade Barclays Bank or the second mortgagee to release an acre from their security. Sargant J. continued: "Nor do I think "that the case is within the spirit of the rule in *Flureau* v. "*Thornhill* (3). For, as is pointed out by Lindley M.R. in "*Day* v. *Singleton* (4) it is an anomalous rule based upon and "justified by difficulties in showing a good title to real property "in this country. Now there is no special difficulty in obtaining "a release of real estate that is in mortgage. All that is "required in general, and all that was requisite here, was to "pay off the mortgage or a sufficient part of it to satisfy the "mortgagees; and but for the lack of pecuniary means, the "testator and his estate were in a position to force the concurrence of the mortgagees. And, this being so, a further "remark of Lindley M.R. in the same passage becomes "apposite, namely, that the anomalous rule in question

(1) [1917] 2 Ch. 405.
(2) Ibid. 409.
(3) 2 W. Bl. 1078.
(4) [1899] 2 Ch. 329.

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"'ought not to be extended to cases in which the reasons, on "'which it is based do not apply.'"

The only possible distinction between *In re Daniel. Daniel* v. *Vassall* (1) and the present case is that the plaintiff has admitted that, when he made the agreement of December 24, 1937, he knew that the property was charged in some way to Barclays Bank. The fact that he knew that there was a mortgage on the property does not seem to me to put the case within the principle of *Flureau* v. *Thornhill* (2) and outside the principle stated by Sargant J. in *In re Daniel. Daniel* v. *Vassall* (1).

I assess the damages at 450*l.*

Judgment for plaintiff.

Solicitor for plaintiff: *George R. Cran.*

Solicitor for defendant: *William C. R. West.*

(1) [1917] 2 Ch. 405.

(2) 2 W. Bl. 1078.

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Apr. 23, 24, 27; *May* 13.

HENRIKSEN (INSPECTOR OF TAXES) *v.* GRAFTON HOTEL, LIMITED.

Revenue—Income tax—Profits or gains—Deductions—Licensed premises—Monopoly value—Instalments paid by tenant under agreement with landlord—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 14—*Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *sch. D; Rules applicable to cases I. and II., r.* 3.

Tenants of licensed premises, by agreement with the landlord, paid by instalments the monopoly value fixed by the licensing justices when granting the licence under s. 14 of the Licensing (Consolidation) Act, 1910. In computing their profits for the purposes of income tax they claimed to deduct, as disbursements wholly and exclusively laid out for the purposes of their trade, the amount of the instalments:—

Held by the Court of Appeal that they were not entitled to make any such deductions. Payments of the character in question fell into the same class as the payment of a premium on the grant of a lease or the expenditure on improvements to the property which justices might require to be made as a condition of granting a licence.

Decision of Lawrence J. [1942] 1 K. B. 82 affirmed.

APPEAL from decision of Lawrence J. (1).

At a meeting of General Commissioners of Income Tax for

(1) [1942] 1 K. B. 82.

Reported by F. R. R. Burford, Esq., Barrister-at-Law.

the division of St. Margaret and St. John, Middlesex, on April 12, 1940, Grafton Hotel, Ld. (hereinafter in this statement of facts called "the company") appealed against certain assessments made on them under sch. D to the Income Tax Act, 1918, in respect of the profits of their trade of licensed hotel and victualling house proprietor, carried on by the company at the Grafton Hotel, Tottenham Court Road, London.

The assessments in question were (*a*) for the year ending April 5, 1939, in the sum of 4805*l.*, less 704*l.* wear and tear; and (*b*) for the year ending April 5, 1940, in the sum of 3750*l.*, less 550*l.* wear and tear. The sole ground of the company's appeal was that in the computation of the profits assessed no deduction had been made for instalments of monopoly value paid by the company under s. 14 of the Licensing (Consolidation) Act, 1910, and amounting to 190*l.* in each of the company's years of account ending on June 24, 1937, and June 24, 1938, on the profits of which the assessments for 1938–1939 and 1939–1940 were based. The company were at all material times in possession of the premises under an agreement dated November 30, 1931, and made between the company and Associated London Properties, Ld. A draft lease was annexed to the agreement. By this the company covenanted (inter alia) to pay all charges which might be imposed in respect of the licences necessary for keeping open the premises as a fully licensed hotel. On March 14, 1934, the licensing justices, on an application by the company for a re-grant of a licence for three years which had been granted in 1931, granted to the company a second licence for the period from July 5, 1934, to July 5, 1937, and imposed as monopoly value the sum of 570*l.*, payable in three instalments of 190*l.* on October 1, 1934, October 1, 1935, and October 1, 1936. The instalment payable on October 1, 1936, was that to which the appeal for 1938–1939 related. On March 10, 1937, the licensing justices granted the company a third licence for the period from July 5, 1937, to July 5, 1940, subject to a further payment of 570*l.* as monopoly value by three yearly instalments of 190*l.*, the first of those payments on October 1, 1937, being that to which the appeal for 1939–1940 related. The commissioners decided that the payments were deductible and the Crown appealed.

On October 1, 1941, Lawrence J. allowed the appeal. From his decision the company appealed.

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J. M. Tucker K.C. and *S. Pascoe Hayward* for the company. Whatever a tenant may have to pay for the use of premises is necessarily something in the nature of a rent, and is not a capital expenditure by him: *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1) and *British Insulated and Helsby Cables, Ld.* v. *Atherton* (2); the latter might be described as a border-line case. See also *Ainley* v. *Edens* (3).

A court of Chancery would say that directors of a company could not pay dividends without deducting the payments in question from the profits of the company. If the tenant were a tenant for life his trustees would be bound to deduct these payments before paying him his profits for the year. The contention that these payments are deductible can be supported by authority: *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1); *Anglo-Persian Oil Co.* v. *Dale* (4). But apart from authority it can be submitted as a matter of pure principle that it was expenditure periodically incurred and should be regarded in the same way as rent paid for the hotel. It was necessary for the company to have a hotel and for the hotel to have the right to sell intoxicating liquors. *Appenrodt* v. *Central Middlesex Assessment Committee* (5) should not be considered an authority against the propositions which we are submitting. It was not a case dealing with income tax; moreover, certain passages in the judgments could be considered favourable to the company. See the remarks of Scott L.J. (6) on the view that monopoly value is in its nature a capital asset. From all aspects, therefore, it can be shown that these payments were properly deductible.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. Where the sum to be paid is by its nature a capital charge, it does not change its nature because it is payable in yearly or half-yearly instalments: *Inland Revenue Commissioners* v. *Adam* (7), a case which was referred to in *Green* v. *Favourite Cinemas, Ld.* (8). A capital sum can be paid by instalments: *Rex* v. *Customs and Excise Commissioners* (9). The payment of these monopoly values is an essential preliminary to the carrying on of a licensed victualler's business and it is immaterial whether the payment is made by one sum or

(1) [1915] A. C. 433.
(2) [1926] A. C. 205.
(3) (1935) 19 Tax Cas. 303.
(4) [1932] 1 K. B. 124.
(5) [1937] 2 K. B. 48.
(6) [1937] 2 K. B. 67, 68, 69.
(7) 1928 S. C. 738.
(8) (1930) 15 Tax Cas. 390, 394.
(9) [1914] 2 K. B. 390, 397.

by instalments. The principal authorities are in favour of the Crown: *Rex* v. *Customs and Excise Commissioners* (1); *Inland Revenue Commissioners* v. *Truman, Hanbury, Buxton & Co., Ld.* (2); *Appenrodt* v. *Central Middlesex Assessment Committee* (3). Though they may not be concerned with questions of income tax, the principles to be deduced from them support the Crown's case. *Appenrodt's* case (3) is really conclusive in the Crown's favour, and no assistance for the company can be obtained from the judgment of Scott L.J. Indeed, if viewed in the right way, it really supports the case of the Crown.

The authorities cited by the company are not really material. In *Usher's* case (4) and the *Anglo-Persian Oil* case (5) the facts were of a special nature, and in *Usher's* case (4) there was no question of capital and income such as we have here. *Ainley* v. *Edens* (6) supports the Crown's case, so does *Robert Addie & Sons Collieries, Ld.* v. *Inland Revenue Commissioners* (7). Payments under sub-s. 2 of s. 14 should be considered as being made anterior to the starting of business, and should therefore be treated as capital payments. *Kneeshaw* v. *Abertolli* (8) cannot be distinguished from the present case. It is immaterial that in this case the company are the lessees of the premises, and that the payments were made under a liability arising from the covenants in the lease. See *Rex* v. *Taylor* (9); *Southwell* v. *Savill Brothers, Ld.* (10).

J. M. Tucker K.C. in reply. The cases cited by counsel for the Crown are not authorities for the propositions submitted by them. *Southwell* v. *Savill Brothers, Ld.* (10) was concerned with questions of brewers, not of landlords and tenants. *Inland Revenue Commissioners* v. *Adam* (11) should not be considered as binding upon this court. Moreover, there was dissension between the learned judges who decided it. Some of the extracts from the authorities cited by counsel for the Crown dealt with cases under sub-s. 1 of s. 14 of the Licensing (Consolidation) Act, 1910. The position might be quite different with cases under sub-s. 2, which deals with licences granted for a term. The real question is: What is the true balance of profits and gains of persons carrying on the business

(1) [1914] 2 K. B. 390, 397.
(2) [1913] A. C. 650.
(3) [1937] 2 K. B. 48.
(4) [1915] A. C. 433.
(5) [1932] 1 K. B. 124.
(6) 19 Tax Cas. 303.
(7) 1924 S. C. 231.
(8) [1940] 2 K. B. 295.
(9) [1915] 2 K. B. 593.
(10) [1901] 2 K. B. 349.
(11) 1928 S. C. 738.

of a licensed hotel? This should be decided according to the ordinary principles of accountancy, but nothing should be done if there is an express statutory prohibition against it. There is no relevant express prohibition in r. 3 of the Rules applicable to cases I. and II. of sch. D to the Income Tax Act, 1918. There is no authority for the proposition that expenditure which is anterior to the carrying on of business should be deemed a capital payment, and it would produce strange results in practice, if it were adopted universally. If one regards the problem from the point of view of common sense and the ordinary principles of accountancy the expenditure cannot be regarded as a capital payment.

Cur. adv. vult.

1942. May 13. The following written judgments were read.

LORD GREENE M.R. A new justices' on-licence granted under s. 14 of the Licensing (Consolidation) Act, 1910, takes one of two forms. It may be an annual licence or it may (under sub-s. 2) be a licence for a term not exceeding seven years. Paradoxically, the annual licence gives in practice a more secure tenure to the licence-holder. Where the licence is granted for a term, an application for a re-grant at the expiration of the term is treated as an application for the grant of a new licence with all the difficulties which that involves. An annual licence, on the other hand, is in ordinary circumstances renewed every year as a matter of course.

On the grant of a new on-licence, the justices are bound to attach conditions "for securing to the public any monopoly "value which is represented by the difference between the "value which the premises will bear, in the opinion of the "justices, when licensed, and the value of the same premises "if they were not licensed." These conditions must be imposed whichever of the two forms above mentioned the licence may take. But in practice there is a difference in application, since in the case of the licence for a term, it is only payment of the part or "slice" of the monopoly value which is referable to the term of the licence that is exacted. The advantage of this method of procedure is that the payments which the licensee is compelled to make for one period can be adjusted in a subsequent period so as to reflect what experience shows to be the real monopoly value. It will be seen, therefore, that in the present case the sum fixed by the justices in the case of each of the three grants was intended to represent that part or "slice" of the monopoly value which was referable to the period covered by the licence. These sums were made payable by annual instalments, but this clearly cannot affect the character which for the present purposes must be ascribed to the payments. If the sum payable is not in the nature of revenue expenditure, it cannot be made so by permitting it to be paid by annual instalments. These payments by instalments in respect of monopoly value have not the annual quality of the payments for the grant of the annual excise licence, but are of a different character.

It was not seriously argued that the payments now in dispute fall within the list of prohibited deductions set out in r. 3 of the Rules applicable to cases I. and II. of sch. D. The question therefore is, to quote the language of Lord Sumner in *Usher's* case (1): Is the deduction claimed "on the facts of the case "a proper debit item to be charged against incomings of the "trade when computing the balance of profits of it"? This, of course, is to state the problem, not to solve it, since it remains to discover whether the item is a proper one to be charged. For this purpose the first thing to do is to examine the nature of the payment, that is to say, the nature of the subject in respect of which the payment is made. In this connection the manner of payment may be relevant as throwing light upon its nature. In many cases—and in my opinion this is one of them—the question will be found to answer itself once the true nature of the payment is ascertained. Here the appellants were minded to acquire an asset in the shape of a licence for a term of years. As a condition of obtaining it, payment had to be made of a sum sufficient to secure to the public that part or slice of the monopoly value which was referable to the period of the licence. The effect of the licensing laws is to grant to a licensee what for practical purposes and in respect of a particular area is in truth a monopoly. What the grantee of a licence is under s. 14 compelled to do is, so to speak, to purchase the monopoly rights for a sum equal to their value. The public confers the monopoly upon him, he must pay the public its value, although in the case of a licence granted for a period under sub-s. 2 he pays not for the whole monopoly value but only for a part of it.

The nature of the payment which justices are to fix in respect

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(1) [1915] A. C. 433, 468.

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of monopoly value has been considered in a number of cases. It is true that these cases were not concerned with questions arising under the Income Tax Acts. They do, however, show what the nature of the payment is as between the licensee and the public and as between a hypothetical tenant and his landlord—in other words, they show what it is that the licensee is paying for. Thus, in *Inland Revenue Commissioners* v. *Truman, Hanbury, Buxton & Co., Ld.* (1) Lord Haldane L.C. observed that s. 14, which he was there considering, dealt "not with the annual value of the licence "but with its capital value." In *Rex* v. *Commissioners of Customs and Excise* (2) justices had omitted to estimate the monopoly value at a definite capital sum and had instead exacted payment of an annual sum representing a percentage of gross takings. This it was held they were not entitled to do. Lord Cozens-Hardy M.R. said (3): "This is a lump "sum, to be ascertained once for all, though when so ascertained "it is competent to the justices in their discretion to say how "that monopoly value is to be secured to the public and "whether it is to be paid in one sum or by instalments." Joyce J. said (4): "I have not succeeded in finding anything "in the Act to countenance the view that there is any such "thing as annual monopoly value." The last of these cases is a rating case in this court: *Appenrodt* v. *Central Middlesex Assessment Committee* (5). There it was decided that in fixing the estimated rent which the hypothetical tenant would be expected to pay the liability for instalments payable in respect of monopoly value ought not to be taken into account. It is not necessary to consider this decision in any detail. Lord Wright M.R. (6) approved the statement of Lush J. in the Divisional Court in *Rex* v. *Customs and Excise Commissioners* (7) that the sum fixed for monopoly value is "the capital sum which represents the "monopoly value" which, Lord Wright said, is only repeating the clear words of s. 14, sub-s. 1, "that the capital payment is "based on the value of the premises and has directly nothing "to do with annual value or with rent." He then went on to point out that in a case falling under sub-s. 2 (as did the case before this court) "though it [the payment] concerns the "market value of the hereditament, it is limited to the number

(1) [1913] A. C. 650, 659.
(2) [1914] 2 K. B. 390.
(3) Ibid. 390, 397.
(4) Ibid. 403.
(5) [1937] 2 K. B. 48.
(6) Ibid. 54.
(7) [1913] 3 K. B. 483, 497.

"of years (not exceeding seven) for which the new on-licence "is granted; a further similar charge for a further period of "monopoly value may be imposed, it seems, at the expiration "of the term." Lord Wright also said (1): "The justices' "licence is essential to give the premises the status necessary "to enable a licensed victualler's business to be carried on." Romer L.J. said (2): "The instalments are an expense neces-"sary for the accrual to the hotel of the incorporeal condition "of being licensed premises." It is true that Scott L.J. (3) thought that a payment under sub-s. 2 is not necessarily a true capital payment, and he referred to the possibility of a fixation of the annual value of the monopoly. With respect, I doubt whether it is open to justices to do this. But in any case, Scott L.J. clearly regarded payment in respect of a five and a quarter years period (which was the case before him) as of a capital nature since he treats (4) the acquisition of the monopoly as being on the same footing as any capital improvement of the property effected before the licensed house was open for business, such as a swimming pool. It is to be noted that the provisions as to fixing monopoly value appear in sub-s. 1 and there is nothing in the section to suggest that any change in the character of the payment or the method of fixing it takes place where a licence for a term is granted under sub-s. 2. It is true that in the two earlier cases the observations which I have quoted were not directed to the case of a licence granted for a term and it is argued that for income tax purposes at any rate the payments in such a case fall into a different category. This argument cannot in my opinion be sustained. The fact that under sub-s. 2 the licence is granted for a term and the payments are made in respect of the term gives a false appearance of periodicity to the payments. In the normal case the grantee of a new on-licence under sub-s. 2 no doubt looks forward to a renewal of his licence and not unnaturally regards the payments which he makes as periodical payments. Indeed, he may well decide in his accounts to debit them to revenue account. This, however, is by no means conclusive as to their nature. Traders frequently prefer to debit to revenue account payments which are in their nature proper to be carried to capital account. If they do so, it means nothing more than that they have a conservative taste in the matter of accountancy.

(1) [1937] 2 K. B. 56.
(2) Ibid. 61.
(3) Ibid. 69.
(4) [1937] 2 K B. 74.

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It appears to me that there can be no difference in principle between a payment out and out for monopoly value and a payment in respect of a term. Each licence granted for a term must stand by itself, since an application for its renewal falls to be treated as an application for a new licence. This is what I mean when I say that there is a false appearance of periodicity about these payments. Whenever a licence is granted for a term, the payment is made as on a purchase of a monopoly for that term. When a licence is granted for a subsequent term, the monopoly value must be paid in respect of that term and so on. The payments are recurrent if the licence is renewed, they are not periodical so as to give them the quality of payments which ought to be debited to revenue account. The thing that is paid for is of a permanent quality although its permanence, being conditioned by the length of the term, is short-lived. A payment of this character appears to me to fall into the same class as the payment of a premium on the grant of a lease, which is admittedly not deductible. In the case of such a premium it is nothing to the point to say that the parties, if they had chosen, might have suppressed the premium and made a corresponding increase in the rent. No doubt they might have done so, but they did not do so in fact. The lessee purchases the term for the premium. There is no revenue quality in a payment made to acquire such an asset as a term of years. Another class of expenditure which is comparable to the payments now in question is expenditure on improvements to the property which justices may require to be made as a condition of granting a licence. Such expenditure would clearly not be deductible in so far at any rate as the work required went beyond mere repairs.

If my view of the nature of this expenditure is correct, it is unnecessary to discuss the authorities in which questions relating to deduction have been considered or to refer to the various attempts which have been made to find a formula for describing what is a proper item to be charged when computing profits in cases which do not fall within the list of prohibited deductions. I need only say that I have considered carefully the authorities to which we have been referred. They have been quoted again and again in the text books and I do not propose to refer to them now. But the conclusion to which I have come in the present case, that the sums claimed are not deductible, is, I think, entirely consonant with those authorities.

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One other argument must be mentioned. It was said that whatever the position might be in the case where, e.g., a freeholder obtains a licence and makes the necessary payments there is a difference where the payments are made by a lessee under a covenant in that behalf contained in his lease. I do not follow this. If a payment is of such a nature as to preclude its deduction when made spontaneously, I cannot see that its nature is affected by reason of the fact that it is made under a covenant with a third party. Capital improvements are often made under a covenant in a lease. I have never heard it suggested that the cost of making them can be deducted by the lessee in computing his profits for income tax purposes. An attempt was made to rescue this argument from shipwreck by saying that if the lessor had undertaken to bear these payments and had consequently exacted a higher rent, the full rent could have been deducted as an expense. This argument has a familiar ring. The answer to it is that this was not the contract which the parties chose to make. It frequently happens in income tax cases that the same result in a business sense can be secured by two different legal transactions, one of which may attract tax and the other not. This is no justification for saying that a taxpayer who has adopted the method which attracts tax is to be treated as though he had chosen the method which does not or vice versa.

The appeal fails and must be dismissed with costs.

DU PARCQ L.J. I agree that this appeal should be dismissed.

The question for our decision is whether two sums of 190*l.* paid by the appellants to their lessors, the first in October, 1936, the second in October, 1937, ought to be deducted in computing, for income tax purposes, the profits of the appellants' trade for the years 1938–39 and 1939–40. The appellants made these payments to their lessors in pursuance of the provision in the lease that all charges imposed in respect of the licences by virtue of the Licensing Act should be paid by the tenants. Under the lease the appellants were tenants for a term of fourteen years. Both parties to the lease intended, as the terms of the lease show, that the tenants should carry on the business of hotel keepers and licensed victuallers on the premises. It became necessary, therefore, to obtain the grant of justices' licences from time to time during the term. We are here concerned with two licences,

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one granted for three years from July 5, 1934, the other for three years from July 5, 1937. Each application for a re-grant of the licence on the expiration of the term had been properly treated "as an application for the grant of a new justices' "licence." (Licensing (Consolidation) Act, 1910, s. 14, sub-s. 2 (*a*).) The Act provides by s. 14, sub-s. 1 (*a*), that there shall be attached to the grant "such conditions as . . . . the "justices think best adapted for securing to the public any "monopoly value which is represented by the difference "between the value which the premises will bear, in the opinion "of the justices, when licensed, and the value of the same "premises if they were not licensed." On the occasion of each of the grants which are material here, the condition attached was that a payment of 570*l.* should be made "as "monopoly value." The justices directed that this sum should be payable by instalments, and each of the sums of 190*l.* in question here was an annual instalment.

The persons liable to pay these sums of 570*l.* under the justices' order were, I think, clearly the licensees, though probably no one expected that the money would come out of their pockets. When it is desirable from the point of view of lessor and lessee alike that the demised premises should be licensed, and nobody else can be expected to pay the cost of obtaining a justices' licence, it is necessary that they should agree how the cost is to be borne. The landlord may pay the cost, and recoup himself by charging a higher rent. In the case of a short tenancy, for instance that of the hypothetical tenant whose position had to be considered in *Appenrodt* v. *Central Middlesex Assessment Committee* (1), the landlord is very likely to pay such a charge "just as much as that of any "other element of value in the hereditament which he lets" (per Lord Wright M.R.) (2). In the present case the lessees (the appellants) bound themselves to pay "all charges . . . . "imposed" in respect of the licences. They accordingly came under an obligation to pay two charges, each of 570*l.*, in respect of the second and third licences. In 1934, and again in 1937 they were left, until a new licence was obtained, without the protection which would enable them to carry on their trade. The payment of the 570*l.* was an expense which secured for them the right to open the Grafton Hotel as a licensed house: without that right they must either have ceased to trade there altogether, or carried on some different

(1) [1937] 2 K. B. 48.

(2) Ibid. 56, 57.

trade, but they could not have continued in business as licensed victuallers in those premises. In other words, when the licence dies, the trade dies, unless the grant of a new licence enables it to be carried on for a further period.

Thus the question which we have to consider comes to be whether a payment of a lump sum made to obtain permission to trade for a term of years is of such a character that it "is "proper and necessary" to deduct it "in order to ascertain "the balance of profits and gains." (See the speech of Lord Parker in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1).) It is conceded that if the payment was in the nature of a capital payment, it is not deductible. Unfortunately the expression "capital payment" does not appear to be capable of precise definition. At any rate I will not attempt to define it, but will confine myself to dealing with the facts of the present case. Here each sum in question was part of a total amount paid to acquire the right to trade for a period of years. At the date when that period began the possession of that right was essential before trading could be begun. In these circumstances, I am of opinion that each sum paid must be considered part of a capital outlay. This view is, I think, in accordance with the principle laid down by the Lord Chancellor in *British Insulated and Helsby Cables, Ld.* v. *Atherton* (2), when he said: "But when an expenditure is made, not only once "and for all, but with a view to bringing into existence an "asset or an advantage for the enduring benefit of a trade, I "think that there is very good reason (in the absence of special "circumstances leading to an opposite conclusion) for treating "such an expenditure as properly attributable not to revenue "but to capital. For this view there is already considerable "authority." In two Scottish cases, Lord Clyde (Lord President) formulated the question for decision as follows: "Are the sums in question part of the trader's working expenses, "are they expenditure laid out as part of the process of profit-"earning; or, on the other hand, are they capital outlays, "are they expenditure necessary for the acquisition of "property or rights of a permanent character the possession "of which is a condition of carrying on the trade at all?": (see *Robert Addie & Sons Collieries, Ld.* v. *Inland Revenue Commissioners* (3), and *Inland Revenue Commissioners* v. *Adam* (4). It is true that the period for which the right was acquired in this case was three years and no more, and a doubt may be raised whether such a right is of "enduring benefit" or "of a permanent character." These phrases, in my opinion, were introduced only for the purpose of making it clear that the "asset" or "right" acquired must have enough durability to justify its being treated as a capital asset. This is borne out, so far as Lord Clyde's judgments are concerned, by the fact that in *Adam's* case (1), the duration of the right acquired was eight years, and that his Lordship there spoke of its "relatively permanent character." "Permanent" is indeed a relative term, and is not synonymous with "everlasting." In my opinion the right to trade for three years as a licensed victualler must be regarded as attaining to the dignity of a capital asset, whereas the payment made for an excise licence is no doubt properly regarded as part of the working expenses for the year.

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(1) [1915] A. C. 433, 458.
(2) [1926] A. C. 205, 213.
(3) 1924 S. C. 231.
(4) 1928 S. C. 738.

For these reasons I have come to the conclusion that the commissioners were wrong, not in their findings of fact, which are not disputed, but in the inference which they appear to have drawn from the facts, and that the decision of Lawrence J. was right, and should be affirmed.

SINGLETON J. The question before the court is, whether a deduction of the 190*l.* instalment of monopoly value paid by the company on October 1, 1936, and on October 1, 1937, ought to be made in order to arrive at the company's taxable profits for the years ending June 24, 1937, and June 24, 1938, respectively. The commissioners decided in favour of the company that it was legitimate and proper to make such a deduction. Lawrence J. reversed that decision and the company appealed.

It is to be remembered that under s. 14, sub-s. 4, a new justices' on-licence granted for a term under the section may . . . . be forfeited, if any condition imposed under the section is not complied with, by order of a court of summary jurisdiction. Thus failure to make any one of the payments might have resulted in loss of the licence, without which the business could not have been carried on.

It was submitted on behalf of the company that the payments were necessary expenses of carrying on the trade or business and that one could not arrive at the yearly profits of the trade or business without deducting the payments made by the company, and further, that the payment made each year by the company was not in the nature of a capital payment

(1) 1928 S. C. 738.

by them, but was a payment which had to be made on the due date in order to enable the company to carry on or to continue the business. The argument on behalf of the Crown was that the payment of monopoly value was an essential preliminary to the carrying on of the trade of a licensed victualler, whether the payment was made in one sum or by instalments, and that the payments were of a capital nature, and consequently the deductions claimed were not permissible.

It becomes necessary to consider what is the nature of the payment made as one of the conditions of the grant of a new justices' on-licence under s. 14 of the Act of 1910. The section (s. 14, sub-s. 1 (*a*)) speaks of it as "any monopoly value which "is represented by the difference between the value which the "premises will bear . . . . when licensed, and the value of "the same premises if they were not licensed." This clearly indicates a capital value, an increased value attached to the premises. This was the view taken in *Rex* v. *Customs and Excise Commissioners* (1). I refer to the report of the case in the Court of Appeal. Lord Cozens-Hardy M.R. said (2): "This is a lump sum, to be ascertained once for all, though "when so ascertained it is competent to the justices in their "discretion to say how that monopoly value is to be secured to "the public, and whether it is to be paid in one sum or by "instalments." Sir Samuel Evans P. said (3): "I think "it is abundantly clear from the section that the 'monopoly "'value' must be a definite sum fixed once for all when the "licence is applied for, and before it is granted. When it "has been fixed, the justices must take measures by the "conditions attached to the grant to secure it to the public: "and they can include in the conditions provisions for payments "by instalments: but by sub-cl. (*b*) of sub-s. 1, the amount "of any payments imposed under the conditions shall not "exceed 'the amount thus required to secure the monopoly "'value.' It follows that the monopoly value cannot be "left to be ascertained or fixed either by the justices, or by "anybody else, annually, or periodically." And Joyce J. said (4): "I have not succeeded in finding anything in the "Act to countenance the view that there is any such thing as "annual monopoly value. I think there is not." The same view was taken by Lawrence J. in *Kneeshaw* v. *Abertolli* (5).

(1) [1914] 2 K. B. 390.
(2) Ibid. 397.
(3) Ibid. 399.
(4) Ibid. 403.
(5) [1940] 2 K. B. 295.

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It is unnecessary to express a view whether what he said as to the mode of assessing monopoly value in the case of a licence granted for a period of years is right or not, but it is clear that he was of opinion that the amount fixed by way of monopoly value was a capital sum. In *Appenrodt* v. *Central Middlesex Assessment Committee* (1), the court was dealing with a question under the Rating and Valuation Act, 1925, and the point which arose was whether instalment payments made by the owner of licensed premises in respect of monopoly value of a licence granted for a period of five and a quarter years could be taken into consideration by way of diminishing the estimated rent which a hypothetical tenant would pay for the premises. The Divisional Court had held that the payments ought not to be taken into consideration, and from two of the judgments at least it is clear that the payments were to be regarded as payments of a capital nature. The Court of Appeal affirmed the decision of the Divisional Court on somewhat different grounds. Reliance was placed by Mr. Tucker on the judgment of Scott L.J. in that case: on the other hand, the Attorney-General submitted that if it was carefully examined it was really support for the case of the Crown. Scott L.J. said (2): "The Divisional Court have, however, "decided that the amount of rent which the hypothetical "tenant would be willing to pay is not in law affected by the "payments of monopoly value. The main reason for the "decision, as explained by the Lord Chief Justice, was that a "payment to be made for monopoly value is, according to "the decision of the Divisional Court, affirmed by this court, "in *Rex* v. *Customs and Excise Commissioners* (3), and followed "by Lord Reading in *Rex* v. *Taylor* (4), a capital payment, "whether payable in one sum or in several instalments. The "learned Chief Justice concluded his judgment thus: 'But "' the one thing that is clear about it is that it is a part of "' capital value, and in those circumstances it seems to me "' that it is impossible to hold that the sum should be taken "' into account by way of deduction when the question is "' asked: What would the hypothetical tenant be prepared "' to pay by way of rent?'" And I draw attention to another passage in the judgment of Scott L.J. (5): "As they "have an unfettered discretion as to how they secure payment of

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(1) [1937] 2 K. B. 48.
(2) Ibid. 66.
(3) [1914] 2 K. B. 390.
(4) [1915] 2 K. B. 593.
(5) [1937] 2 K. B. 69.

"the monopoly value during the period, I can see nothing to "prevent their providing in each year for payment of an "amount which they estimate will be the equivalent of the "annual value of the monopoly in that year, if they so choose. "But whether they make it a lump sum for the period payable "once for all or by instalments, or an annual payment proper "at the beginning of each year, seems to me immaterial. It "shows, at any rate, that a payment under sub-s. 2 is not "necessarily a true capital payment." I confess that I find it difficult to reconcile some expressions of Scott L.J. with the views of the Court of Appeal as expressed in *Rex* v. *Customs and Excise Commissioners* (1). If, as the lord justice said, the words " capital sum " were not used in the judgments in the case (1), there were references to a " lump sum payment "to be ascertained once and for all " ; and Joyce J. in his judgment made it clear that he could find nothing which pointed to an annual payment. And yet it must be borne in mind that that which was being considered was a payment made for a licence granted under sub-s. 1 of s. 14, while in *Appenrodt's* case (2) it was a payment for a licence granted under sub-s. 2. Scott L.J. obviously thought that there might be a difference between the two, and that is something which has to be considered. In this connection it must not be overlooked that sub-s. 1 alone deals with the payment which may have to be made, and it is not easy to see that a payment required under that sub-section may sometimes be a capital payment and at other times something quite different. Moreover, the monopoly value for which the payment is required attaches in a sense to the premises. The amount of it is determined in a normal case very much in the same way as compensation was determined in the case of a redundant old on-licence. That was always regarded as a capital sum, and so, I venture to think, has monopoly value been.

I cannot help feeling that there has been some misunderstanding as to s. 14 of the Licensing (Consolidation) Act, 1910, which was in the same terms generally as s. 4 of the Act of 1904. I have always understood that the reason for sub-s. 2 enabling a licence to be granted for a period was because of the difficulty of arriving at the amount to be paid by way of monopoly value. If the licensing justices granted the ordinary licence (spoken of as an annual licence) and fixed a sum to be paid for monopoly value, they could not afterwards alter

(1) [1914] 2 K. B. 390.

(2) [1937] 2 K. B. 48.

that sum, however unfair it might turn out to be to the one side or to the other. And the difficulty of arriving at a figure in respect of a new house in a growing neighbourhood before trade has commenced is obvious. To avoid this difficulty, or to meet it to some extent, it was provided that a licence could be granted for a period, and when that course was adopted a more or less nominal payment was required in the first instance for monopoly value, and when the subsequent application was made the justices, with the help of the Commissioners of Customs and Excise, and with knowledge of the trade of the house and of development of the neighbourhood, were in a much better position to form a view as to what amount should be required by way of monopoly value. The first payment (already made) was regarded as in the nature of a payment on account, and a sum was fixed which was much more likely to be fair to both sides than one determined on the initial application could reasonably have been expected to be. (See note in Paterson's Licensing Acts, 51st ed., p. 493.) If this is the correct view, a payment required on the grant of a licence under sub-s. 2 is just as much a capital payment as it is in the case of a grant under sub-s. 1, and that I think was the view of the Lord Chief Justice in *Appenrodt's* case (1).

We were told by the Attorney-General that there was a practice in London of granting period licences again and again, as was done in the present case. Now it may be that that is strictly within the terms of sub-s. 2 of s. 14, but I cannot think that it was the intention of the legislature. If the justices adopt such a course, and if they time and again fix a sum for what is described as monopoly value for a period, they are, in my view, departing from the general understanding of monopoly value. The period may be a short one, and it can be argued that what they are then requiring from the applicant is a periodical payment to allow him to carry on his trade in that house. If that is the true position, they do not alter it by calling it a lump sum payable by instalments. In the case which we have to consider, on each of the last two applications the justices fixed the sum of 570*l.*, payable by instalments of 190*l.* a year. It is at least akin to saying: "Pay 190*l.* a year for the privilege of carrying on your trade "on those premises." No doubt the justices had the help of the Commissioners of Customs and Excise (as representing the public) in arriving at the proper sum, and if they can be

(1) [1937] 2 K. B. 48.

said to be parties to the fixing of a sum to be paid annually for these so-called period licences the position is indeed confused.

The case does not give the reasons for the decision of the commissioners. If they had found as a fact that the justices had on either of the last two applications decided that 190*l.* a year was the amount to be paid for the licence to trade during that year, it seems to me that it would have been difficult for any court to interfere with their decision. In the absence of any such finding we must come to the conclusion that the justices did that which was their duty and fixed a capital sum as the value of the monopoly. If that is so, the appellants are not entitled to have the amount of an instalment of a capital sum allowed as a deduction in calculating their yearly profits, any more than they would be if they had entered into a contract with the owners to rebuild or to make structural alterations (as distinct from repairs) which the licensing justices might require during the currency of the lease.

I have dealt with s. 14 of the Licensing Act, 1910, at some length, because of what we were told as to the practice of granting period licences, not merely on the first application for a new justices' on-licence, but on subsequent applications. If this is done, and if a sum is required to be paid by way of monopoly value for a short period, it is arguable that the sum "is not necessarily a true capital payment," as Scott L.J. said in *Appenrodt's* case (1), but that it is rather an amount required for the privilege of carrying on the trade for the period. It may be that this was the view of the commissioners, but they have not so found. In the course of the argument it was suggested that it might be necessary to send the case back for findings of fact, but Mr. Tucker for the company said he could not ask the commissioners to find that the justices had done something illegal, i.e., that they had fixed a yearly sum instead of a capital sum. In the absence of any such finding by the commissioners, I do not see that it is open to this court to say that the sum fixed is other than a capital sum, and consequently I agree that the appeal fails.

Appeal dismissed.

Solicitors for the company: *Bower, Cotton & Bower.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

(1) [1937] 2 K. B. 48.

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16, 19.

LORENTZEN *v.* LYDDEN AND COMPANY, LIMITED.

International law—Decree of foreign government—Transfer to curator of title to chose in action not situated in territory of foreign government—Extra-territorial effect of decree—Right of curator to sue.

The Norwegian Government made a decree by which all ships registered in Norway and situated outside the area in Norway occupied by an enemy power, and owned by (inter alia) a company carrying on business in that area, were requisitioned by the Norwegian Government, and the Norwegian Minister of Shipping, who was in the decree called "curator," was given power to take over ships under construction outside the occupied area, and he was stated to be entitled to collect claims belonging to the owners, and to enforce such claims by action. The decree provided for compensation to be given for what had been taken under the decree. Acting under the powers conferred by that decree the curator brought an action on behalf of the owners of the steamship *Tempo*, who were a company carrying on business in Oslo, against the defendants, a firm carrying on business in London, to recover damages for breach by them of a contract to charter the steamship *Tempo* for the carriage of goods from Oslo to Leith. The defendants by their defence denied that the curator had any right or title to collect claims belonging to the owners of the steamship *Tempo* or to enforce the alleged claims, and said that the Norwegian Government could not by any legislative or executive act transfer the title to claims or other property situated in England. The issue as to the title of the curator to sue was ordered to be tried as a preliminary point:—

Held, that the decree, not being of a confiscatory character, had an extra-territorial effect and operated to pass the ownership of the chose in action which was situate in England to the curator appointed by the Norwegian Government, and that therefore the curator was entitled to maintain the action.

TRIAL of preliminary points of law before Atkinson J.

The plaintiff, who was the curator appointed by the Royal Norwegian Government, brought an action, for and on behalf of the owners of the steamship *Tempo*, a company known as A/s Benita, carrying on business in Oslo, against the defendants, Lydden & Co., Ld., a firm carrying on business in London, to recover damages for breach by the defendants of a contract, whereby the defendants agreed to charter the *Tempo* for the carriage of eight hundred tons of pulp from Oslo to Grangemouth or Leith. The defendants' obligations were to be performed in Oslo. It was alleged that the defendants in October, 1939, repudiated the contract. In the statement of claim the title of the curator to sue was based upon an Order in Council of the Royal

Norwegian Government dated May 18, 1940, authorizing him to collect claims belonging to shipowners and enforce them by action.

The defence, while admitting that A/s Benita were a company registered and having its board of directors in and carrying on business in Oslo, denied that they had ever been the owners of the *Tempo*, and also denied that the curator had any right or title to collect claims belonging to the owners of the *Tempo* or to enforce the alleged claims. It was said that the Norwegian Government could not by any legislative or executive act transfer the title to claims or other property situated in this country, but the plea also covered a contention that the order relied on did not as a matter of construction embrace claims belonging to A/s Benita. There were also denials of the contract and of the alleged breach.

By an order dated November 29, 1941, it was directed that the issues as to ownership and the title to sue should be decided as preliminary points. At the hearing it was admitted that the *Tempo* was the property of A/s Benita. It was further agreed that she had been sunk on April 3, 1940.

The order of the Norwegian Government, which was relied on by the plaintiff as conferring upon him a right to sue, was made on May 18, 1940, at Trondjhem, in Norway (1). Art. 1 provided that "All ships registered in Norway or belonging to a "port there and situate outside the area in Norway which is "occupied by an enemy power and which are owned by "(*a*) persons domiciled in the occupied area or carrying on "business from an office there, (*b*) part ownerships, corporations, "joint stock companies or other companies registered in or "having their board of directors in such area or carrying on "business from an office there are considered as requisitioned "by the Norwegian Government, who hereby takes over the "right to use the ships." Art. 2 gave the Norwegian Minister of Shipping power to take over ships under construction outside occupied areas and contracts for the construction of ships belonging to such persons or companies. By art. 4, sub-s. 1, the Minister of Shipping, in exercising his powers under this order was called "curator." By sub-s. 2 he was to exercise to the exclusion of the right of the owner the right of property in all assets outside the occupied areas belonging to owners as mentioned in arts. 1 and 2. By sub-s. 3 he was "entitled "to collect claims belonging to owners as mentioned in arts.

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(1) An agreed translation of the Order was put in.

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"1 and 2, to enforce by action or otherwise any claims that "may already have, or which they may later acquire, to effect "compromises or accept settlements and give valid discharges." Sub-s. 4 provided that "The provisions of the second and third "paragraphs of the present article only apply to assets which "the owner has made use of in his shipping business and claims "he has acquired in such business." Art. 5 provided that: "Compensation for what has been taken over by the Govern- "ment by virtue of the Provisional Order in Council of April 22, "1940, or which is taken over by virtue of the present Order "in Council shall be fixed in accordance with Norwegian law."

A Norwegian advocate, Mr. Dahl-Hansen, gave evidence at the hearing, which was accepted by the judge. He said that the order was properly made in accordance with the Norwegian constitution and was legally binding in Norway and upon Norwegian subjects wherever they were; that the order was intended to apply to all persons and companies carrying on business as shipowners in occupied Norway, and that, if there were any ambiguity in the order, a Norwegian court would pay attention to the intention of the order, and seek to give effect to that intention.

A. W. Roskill for the plaintiff.

P. Devlin for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

1941. Dec. 19. ATKINSON J. The dispute on construction turns on the meaning of the words in art. 4: "belonging to "owners as mentioned in Articles 1 and 2." It is said by the defendants that no person or company comes within this description unless they in fact own a ship outside enemy-occupied property. I am satisfied that the words "owners as "mentioned in Articles 1 and 2" mean the persons and companies described in (*a*) and (*b*) of art. 1 and were used to avoid repetition. Art. 4 (3.) must be read in this way: "The curator is entitled to collect claims belonging to (*a*) "persons domiciled in the occupied area or carrying on business "from an office there, (*b*) part ownerships, corporations, joint "stock companies or other companies registered in or having "their board of directors in such area or carrying on business "from an office there," such persons or companies being limited to those carrying on business as shipowners or carrying on, to use the words in sub-s. 4 of art. 4, a "shipping business." A construction that no persons or companies are affected by the order, unless they own a ship outside the occupied area at the date of the order, would lead to absurd results which could not have been intended, a ship under construction in England, for example, could not be taken over unless its owner also owned a ship outside the occupied area. This point fails.

The other point raises a question of the greatest importance and of some difficulty. It is said that by English law this Order in Council cannot operate to pass the ownership of any movable property or of any chose in action situate in England; that foreign legislation can have no extra-territorial effect. If that is right this order is of little avail, because it applies solely to property situate outside the territory of Norway. The situs of a debt or chose in action is, generally speaking, the country in which the debtor is to be found and sued. The argument for the contention began by a quotation from an article by Dr. Arnold McNair in the Law Quarterly Review for January, 1941, p. 47. Before reading that quotation it might be as well to read r. 154 in Dicey's Conflict of Laws, 5th ed.: (1.) "Subject to the exception hereinafter "mentioned, and to the very wide effect of rules 152 and 153, "the transfer or assignment of a movable, wherever situate, "in accordance with the law of the owner's domicil (lex "domicilii), or the place where such transfer or assignment is "made (lex actus), may be presumed to be valid. (2.) An assign-"ment, not made in the locus situs, of an intangible movable, "i.e., a debt, which is not made in accordance with the lex "domicilii or the lex actus, may be presumed to be invalid." An assignment in Norway inter partes would therefore have to comply with the law of Norway. Does the same principle apply to a statutory assignment? Dr. McNair's article purports to deal with the effect of acts of government of an occupying belligerent, but on page 47 Dr. McNair says: "It may be useful to preface the matter by stating in "general terms the principle which guides English courts in "giving effect to the acts (legislative, executive and judicial) of "foreign Governments. It is described by Dicey as follows:— "'A State's authority, in the eyes of other States and the "'Courts that represent them, is, speaking very generally, "'coincident with, and limited by, its power. It is territorial.

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"'It may legislate for, and give judgments affecting, things and "'persons within its territory. It has no authority to legislate "'for, or adjudicate upon, things or persons (unless they are "'its subjects) not within its territory.' The rule which "denies extra-territorial effect to the laws of a country requires "a little elaboration for our present purposes," and the learned author goes on to say that the rule has received illustration from a number of decisions arising out of the Soviet Revolution. There are only two comments which I desire to make upon the quotation from Dicey. The first is to underline the words "speaking very generally," and secondly to underline the exception "unless they are its subjects." It is plain that the order in this case does not affect in any way the rights of anyone in this country. It regulates the rights of the owner of the debt in Oslo and that owner's government. It makes no difference to the defendants whether the action is brought by A/s Benita or by the curator on behalf of A/s Benita.

The cases relied upon start with *The Jupiter* (*No.* 3) (1). That case concerned the fate of a ship which was in Odessa when two Russian decrees vested all ships belonging to private individuals or companies in the State. Odessa was not then in the State of Russia. The decision was that it was not proved that the decrees had the effect of transferring the property in the ship to the Republic. There was evidence as to the meaning and effect of the two decrees, and it was decided as a question of fact that by the terms of the two decrees they were not intended to affect property outside the territory of the Republic. A passage much relied upon by the defendants appears in the judgment of Hill J. (2), which is as follows: "As to the second question—that is, "the question whether the decrees transferred the property "wherever situated—it was not suggested that ships were "to be governed by any principles other than those applicable "to other chattels. If the *Jupiter* was not within the territory "of the R.S.F.S.R. I do not see how the mere passing of a "decree could transfer the property. This seems to me to "be recognized in all the cases: see, for instance, per Atkin L.J. "in *Goukassow's* case (3); per Sargant L.J. in *Sedgwick, "Collins & Co.'s* case in the Court of Appeal (4); and per the "Lord Chancellor in the latter case in the House of Lords (5).

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(1) [1927] P. 122.

(2) Ibid. 144.

(3) [1923] 2 K. B. 682, 693.

(4) [1926] 1 K. B. 1, 15.

(5) [1927] A. C. 95.

"The Lord Chancellor treats it as obvious that the property "and rights of the company in the countries foreign to Russia "are not effectively taken from it by the Russian legislation. "I am strengthened in this opinion by the view taken by the "R.S.F.S.R. itself, as set forth in two circulars," and then the learned judge went on to point out that the decrees in question did not purport to regulate property relations outside the territory of the Republic. Hill J. seems there to be expressing an opinion not based upon the terms of the decrees, but an opinion which he says is supported by the view taken of the interpretation of the decrees by the Russian Government itself. But it seems wiser to be guided by what the Court of Appeal said that Hill J. had decided.

Before coming to that I wish to refer to the two cases which Hill J. mentioned. I have read *Goukassow's* case (1), and with the greatest respect to Hill J.'s judgment I cannot find a single word in the judgment of Atkin L.J. which lends any support to the suggestion that he recognizes that there can be no transfer of property outside the jurisdiction of the State issuing the decree. He was considering the result of certain decrees which dissolved existing Russian banking corporations. The plaintiff company had a branch in Paris to which the defendant owed a large sum of money. As, according to previous decisions, the plaintiff bank had not ceased to exist, the defendant was held liable to pay his debt. I cannot find any statement of any general principle supporting the defendants' contention here. In the next case, *Sedgwick, Collins & Co.* v. *Rossia Insurance Co. of Petrograd* (2), the plaintiffs were claiming to be creditors of a Russian insurance company which had a branch in this country and had obtained a garnishee order nisi against certain debtors to the Russian company. The question was whether this garnishee order ought to be made absolute and whether it was effective. The creditors were here and were claiming as against property of the company here. The decision was that the order was effective. It had already been decided by the House of Lords in 1925 that banks did not effectively cease to exist in this country by virtue of the Soviet decrees, and it was held in the *Sedgwick, Collins* case (2) that insurance companies were in no different position, and that debts due to them could be the subject of a garnishee order.

(1) [1923] 2 K. B. 682.

(2) [1926] 1 K. B. 1.

The Court of Appeal in *The Jupiter* case (1) affirmed the decision of Hill J. Bankes L.J. said (2): "The two main "questions that emerge, indeed, I think the only two questions "which emerge, in this appeal, are: first, whether the "Italian company have a title superior to any title to which "the French administrator can make a claim; and, secondly, "whether in the events which happened, the French "administrator has established that he has a sufficient "possessory title to maintain the action. Those are the two "questions, and, of course, the more important is the first "one, because if that is established it becomes unnecessary "to consider the second. The first question, in my opinion, "depends entirely upon questions of fact, because it depends "partly on questions of Russian law, which must be treated "as questions of fact, and also upon what I may call pure "questions of fact. The learned judge has come to a clear "conclusion on all those points, and, for reasons which I will "give in a moment, I see no ground whatever for differing "from his conclusions." Then later he said (3): "The answer "to that, as found by Hill J., was that assuming that the "decree had the effect contended for, and assuming that the "circumstances which occurred in March, 1924, amounted "to a taking possession of the vessel, yet for two reasons the "Italian company had not made out their case. First, on "his view of the evidence as to Russian law, he came to the "conclusion—and I see no reason whatever for differing from "him—that the decree had no operation to transfer any "property except property within the jurisdiction of the "Soviet Republic. The learned judge first expresses an "opinion about the decrees. He says (4): 'If the view "'I have expressed is the true view of the decrees considered "'in themselves, I am quite unable to arrive at a contrary "'decision upon the most conflicting evidence called before "'me. It is for the defendants to satisfy me that the decrees "'were legislative acts, and that they had the effect alleged. "'They have wholly failed to do so.' It is not necessary, "and I do not wish to express any opinion upon that. The "learned judge then comes to the second question (4): 'As "'to the second question—that is the question whether the "'decrees transferred the property wherever situated—it was "'not suggested that ships were to be governed by any

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(1) [1927] P. 250.
(2) Ibid. 252.
(3) Ibid. 253.
(4) [1927] P. 122, 144.

"'principles other than those applicable to other chattels.' "He refers to some dicta and some cases, which he thinks "are in support of his view, deals with the evidence, and "comes to the conclusion upon the evidence of Russian law "that the decrees have no application to property not situate "within the jurisdiction of the Soviet Republic." Atkin L.J. agreed, and Lawrence L.J. put his view very concisely (1): "In my opinion the determining factors in this case are: "(1.) That the nationalizing decrees of the U.S.S.R. do not "operate on property outside the territory of that Republic, "whether such property belonged to a Russian citizen or not. "(2.) That the *Jupiter* was not at the date when those decrees "were promulgated, and has not since been within the "territory of that Republic and (3.) That at the time when the "*Jupiter* was handed over by the master to the U.S.S.R. she "was in the lawful possession of the French provisional administrator. The learned judge has treated these three matters, "and rightly I think, as pure questions of fact to be decided "upon the evidence which was adduced before him at the "trial." Now, what does all that mean? It means this, not that whatever the intended meaning of the Russian decrees was they could not affect property outside Russian territory, but that, as a matter of fact, that is on the construction of the dcerees themselves, and he construed them on the evidence given to him by Russian lawyers, they did not purport to affect the title to property outside Russian territory. It seems to me that so far from being an authority in support of Mr. Devlin's contention it is all the other way. It would have been so easy to say: " Well, why should I listen to evidence "about the effect of these decrees because, whatever they mean, "as a matter of law they cannot have an extra-territorial "effect."

The next case referred to was *Princess Paley Olga* v. *Weisz* (2). The issue there was whether the title to movable property in Russia at the time of the decrees was effectively passed to the Republic. The movables in question had been sold in Russia by the Soviet Republic to the defendants who brought them to England, and the original owner was suing to recover those movables or damages for their detention or conversion. The material point is that at the date of the decrees the property was in Russia. Scrutton L.J., in his judgment, quotes

(1) [1927] P. 255.

(2) [1929] 1 K. B. 718.

a passage from an American case, and then says (1): "I "substantially agree with the careful judgment of MacKinnon J. "Our Government has recognized the present Russian "Government as the de jure Government of Russia, and our "courts are bound to give effect to the laws and acts of that "Government so far as they relate to property within that "jurisdiction when it was affected by those laws and acts." It is said that the conclusion I am to draw from that passage is that, unless the property is within the jurisdiction our courts cannot give effect to those laws and acts. Again and again judges have been told by the Court of Appeal and the House of Lords that words used in previous cases must be interpreted with reference to the facts before the court and the issues with which it was dealing. I decline to read into that judgment an affirmative statement that in no circumstances will our courts give extra-territorial effect to decrees of a foreign state. Russell L.J. (2) said the same thing, merely dealing with the point before him, and Sankey L.J. (3) refers to "the American case of *Oetjen* v. *Central Leather Co.* (4) "which was mentioned with approval in the Court of Appeal "in *A. M. Luther Co.* v. *James Sagor & Co.* (5)" and added that it "states the American, which in my view is the same "as English, law in such circumstances." Later he says: "'The principle that the conduct of one independent Govern- "'ment cannot be successfully questioned in the courts "'of another is as applicable to a case involving the title "'to property brought within the custody of a court as "'claims for damages based upon acts done in a foreign country, "'for it rests at last upon the highest considerations of "'international comity and expediency.'"

The next case which was referred to was one of which unfortunately there is a very inadequate report: *The Manufacturing Co. I.A. Wormin Luetchg* and *Cheshire Lim. and Cheshire* v. *Frederick Huth & Co.* (6). In that case it was sought to establish the proposition that Russian decrees did affect personal property here, and the claim failed. The defendants also contended that the title of the plaintiff company to the war bonds and money in the hands of the defendants had been taken away by the Soviet decrees of

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(1) [1929] 1 K. B. 725.
(2) Ibid. 736.
(3) Ibid. 728, 729.
(4) (1918) 246 U. S. 297.
(5) [1921] 3 K. B. 532.
(6) International Law Year Book for 1930, p. 235.

June, 1918, and November, 1918. The case was tried by Wright J., and all that the report says is: "Held, with regard "to point 4, that the Soviet confiscatory decrees did not "purport to, and in any case could not, have the effect of "transferring the ownership of the bonds and balances of the "plaintiff company in the hands of the defendants in England, "since the property was not situated in the jurisdiction of "the Soviet Government, and such decrees could have no "ex-territorial effect." There are two points to observe, first that obviously the learned judge had emphasized the confiscatory nature of the decrees, and, secondly, that the decrees themselves did not purport to transfer the ownership of extra-territorial property. Although I was in that case my memory does not enable me to add in any way to what appears in that meagre report.

The sheet anchor upon which Mr. Devlin relied was *In re Russian Bank for Foreign Trade* (1). There Maugham J. was dealing with a petition to wind up a branch in England of a Russian bank carrying on business here. The petition was by a creditor of the bank in this country, and a winding-up order was made. The learned judge pointed out (2) that the decrees he was considering admittedly were of a confiscatory character. The passage mainly relied upon was this (3): "If the debt was primarily recoverable in London, "I am of opinion that it was not affected by the Soviet "legislation, even though it was due to a person who was a "Russian subject at the date of the nationalization decrees. "Its locality must be taken to be the place where the debt "was in the ordinary course recoverable: see *Rex* v. *Lovitt* (4), "*New York Life Insurance Co.* v. *Public Trustee* (5) and *English, "Scottish and Australian Bank, Ld.* v. *Inland Revenue "Commissioners* (6). The decrees in question could not "according to our laws have the effect of extinguishing the "debt, if locally situate here, or of transferring it to the "Soviet Republic. This follows, I think, from the decision of "Hill J. and the Court of Appeal in *The Jupiter* (*No.* 3) (7). "It is interesting to note that the same view is taken by the "R.S.F.S.R. itself in a circular dated April 12, 1922, and in "a circular issued by the People's Commissariat of Justice

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(1) [1933] Ch. 745.
(2) Ibid. 763.
(3) Ibid. 767.
(4) [1912] A. C. 212.
(5) [1924] 2 Ch. 101.
(6) [1932] A. C. 238.
(7) [1927] P. 122, 250.

"to all District Courts dated September 26, 1923, which are "set out in the elaborate judgment of Hill J. above referred "to. These circulars show that the Soviet Government does "not regard the nationalizing decrees as having any extra-"territorial effect even as against Russian citizens." It is impossible to construe that passage as laying down a general rule of law. The learned judge was dealing with Soviet confiscatory legislation, and with the effect of decrees which did not purport to have extra-territorial effect. I cannot regard his decision as one governing the effect on a chose in action in this country of a decree which is not confiscatory and which in terms purports to deal with, and deal only with, extra-territorial property. Therefore it seems to me that there is no authority which has been cited to me which prevents me from giving effect to this decree.

I wished to make sure that our Government at that time was still recognizing the Norwegian Government as the de jure Government of Norway, and also that no other Government was recognized as the de facto Government. I have this letter from the Foreign Office. "In reply to your letter of "December 3, I am directed by Mr. Secretary Eden to state "that on May 18, 1940, His Majesty's Government in the "United Kingdom recognized the Norwegian Government as "the de jure Government of the entire Kingdom of Norway and "did not at that date recognize, and have never recognized, "any other Government as either the de jure or the de facto "Government of Norway or any part thereof."

The question to my mind is how far I am entitled to give effect to those matters indicated as relevant in Sankey L.J.'s judgment in *Princess Paley Olga* v. *Weisz* (1), where he cited with approval as stating English law as well as American law the words "for it rests at last upon the highest considera-"tions of international comity and expediency."

There has quite recently, on May 23, 1941, been decided by the High Court in New York, a case raising the precise point: *Anderson* v. *N.V. Transandine Handelmaatschappij* (2). It was a decision of Shientag J., and I am told that his decision has been affirmed by the Appellate Division of the New York Court of Appeal. The plaintiffs had attached and levied on certain property of the defendants. The defendants were moving to vacate the attachment on the ground that the property sought to be attached belonged to the State of

(1) [1929] 1 K. B. 718, 729. (2) Unreported.

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the Netherlands. The learned judge said (1): "The State of "the Netherlands, a foreign friendly sovereign state has, "pursuant to an order of this court, intervened specially "in this action for the purpose of moving to vacate the "attachment, and its position is substantially that urged "by the defendants in this case. The important question "presented on this motion concerns the scope and effect of "the Netherlands Royal Decree of May 24, 1940. The "motion which has been made results from conditions arising "out of the European war which has created unprecedented "problems. On May 10, 1940, the territory of the Netherlands "in Europe was invaded by Germany, and thereafter was "occupied by and has since then remained under the hostile "occupation of the German military forces. The Royal "Netherlands Government, in order to carry on the functions "of government free from German domination, thereafter "moved from The Hague in the Netherlands to London, "England. The Government of the United States continues "to recognize this government as the Government of the "Kingdom of the Netherlands, and this government is also "so recognized by the British Government. A large part of "the territory of the Kingdom of the Netherlands, namely, "the Netherlands West Indies and Surinam and the East "Indies, which together comprise an area of more than 788,000 "square miles and a population of over 60,000,000 people, "are not under enemy occupation. They remain under the "sovereign control of the recognized Government of the "Netherlands. Brief mention is made in the affidavit of "the Commercial Counsel of the Netherlands legation in "Washington of the measures taken by the German invaders "to avail themselves of the resources of the occupied territory "of the Netherlands and to exercise dominion from that "territory over other resources of Netherlands nationals. In "order to prevent the foreign resources of Netherlands "companies and individuals, domiciled in the occupied "territory of the Netherlands, from being used by the enemy "of the Netherlands, the Netherlands Government took "certain protective measures. The first and basic step in "this program was the adoption of the Netherlands Royal "Decree of May 24, 1940. The Royal Decree vested in the "State of the Netherlands the title to assets such as is here "sought to be attached, namely, cash accounts and securities

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(1) From a transcript of the shorthand notes of the judgment.

"belonging to natural and legal persons domiciled in the "occupied territory of the Netherlands and deposited with "American corporations and firms. The defendants in the "present action are a Netherlands corporation and certain "subjects and residents of the Netherlands who are understood "to be the managers of the corporation. All were domiciled "in the Netherlands at the time of the occupation of the "Netherlands by Germany and have thereafter remained "domiciled there. The plaintiff is a resident of the State of "New York, and he is what is commonly known as an assignee "for collection, the alleged assignment to him having been "made solely for the purpose of making him, instead of his "assignor, the plaintiff in this action. The plaintiff's assignor, "Martin Tiots, is a non-resident alien, a citizen of a country of "Europe, said to be Liechtenstein, and is now understood "to be resident in Cuba. The plaintiff's alleged cause of "action arose outside of the United States. The complaint "alleges that the plaintiff's assignor had deposited certain "securities of Netherlands and Belgian companies and cash in "Netherlands currency with the defendant corporation or "with the individual defendants, the managers of the company. "The complaint also alleges that the assignor demanded the "delivery to him of such securities and cash at various times "prior to the invasion of the Netherlands. The defendants, "it is alleged, failed and refused to deliver them. It is for "the damages resulting from such failure that the present suit "has been brought and action taken to attach, in New York "depositaries, the claimed dollar equivalent in value at the "date of the alleged demand in the Netherlands of the foreign "securities and cash. The Netherlands decree is a valid act "of the State of the Netherlands and has vested in the State "of the Netherlands title to the property sought to be attached. "It is clearly established by the authorities that our courts "should regard the Netherlands decree as a lawful act of the "State of the Netherlands. 'What government is to be "'regarded here as representative of a foreign sovereign "'state is a political rather than a judicial question, and is "'to be determined by the political department of the "'government.'" That is a quotation from the *Guaranty Trust Co.* v. *United States* (1) per Stone J. "The Government "of the United States recognizes the government that "promulgated the Netherlands decree as the government of the

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(1) (1938) 304 U. S. 126, 137.

"Kingdom of the Netherlands, and therefore that government "is representative of the State of the Netherlands in so far as "our courts are concerned. As such the acts of the Royal "Netherlands Government must be deemed to be the acts "of the State of the Netherlands. The Supreme Court of the "United States has held: 'The principle that the conduct "'of one independent government cannot be successfully "'questioned in the courts of another is as applicable to a case "'involving the title to property brought within the custody "'of a court, such as we have here, as it was held to be in the "'cases cited, in which claims for damages were based upon "'acts done in a foreign country, for it rests at last upon "'the highest considerations of international comity and "'expediency. To permit the validity of the acts of one "'sovereign state to be re-examined and perhaps condemned "'by the courts of another would very certainly imperil the "'amicable relations between governments and vex the "'peace of nations.'" That was from the case of *Oetjen* v. *Central Leather Co.* (1), which Sankey L.J. referred to with approval as stating the English law. There are also a few other lines in the judgment which are relevant: "Legislation of a recognized foreign state, vesting title in the state "to property of its nationals, is not contrary to the public "policy of the United States or of the State of New York. "The leading case in this field is *United States* v. *Belmont* (2). "That case involved the title of the Soviet Government "to a cash deposit with a New York institution standing "in the name of a corporation which had been nationalized "by the Soviet Government. There was here involved "an act of confiscation, as was freely recognized by the "court. The United States Government, as assignee of "the Soviet Government, but clearly having no rights superior "to those of its assignor, sued to recover the deposit. The "Supreme Court of the United States held that the United "States had a good cause of action as assignee of the Soviet "Government's claim." It is conceded that if our law is the same as the law laid down in that judgment the plaintiff's title to judgment is well established. I think it is the same. It seems to me that the English courts are entitled to take into consideration the following matters: that this is not a confiscatory decree, see art. 5 of the decree, that England and Norway are engaged together in a desperate war for their

(1) 246 U. S. 297, 303.

(2) (1937) 301 U. S. 324.

existence, and that public policy demands that effect should be given to this decree. To suggest that the English courts have no power to give effect to a decree making over to the Norwegian Government ships under construction in this country seems to me to be almost shocking. At any rate, where the dictates of policy are so plain, it seems to me that following that judgment and the judgments referred to therein I am entitled to give effect to this decree. It is not confiscatory, it is in the interests of public policy, and it is in accordance with the comity of nations. Therefore I determine this issue in favour of the plaintiff.

Before I leave it, I would like to refer to the last case which has been decided on the point, the case of *Banco de Vizcaya* v. *Don Alfonso de Borbon Y Austria* (1): The Spanish Government declared the defendant, the ex-King of Spain, to be a traitor, and decreed that all his property and grounds of action should be seized for the benefit of the State, and that all bankers in Spain having in deposit any such property should make delivery thereof to the Spanish Treasury. Certain securities, the private property of the defendant, had been deposited at the Westminster Bank in London to the order of the plaintiffs, a Spanish bank in Spain, as the defendant's agents. Both the plaintiffs and the defendant claimed the delivery up of these securities. It was held that the defendant was entitled to retain them. Why ?—because the legislation was penal in character. It was on a par with confiscatory legislation. If the rule of law were such as is contended for here, that a Spanish decree could have no extra-territorial effect, it would have been wholly unnecessary to say more. But it was not suggested by counsel or in the very careful judgment of Lawrence J. The judgment rested on the fact that to give effect to the decree would be to enforce a penal law, and it was on that ground that the claim failed.

I think that disposes of these preliminary issues and I hold that the action is maintainable.

Preliminary issue decided in favour of plaintiff. (2)

Solicitors for plaintiff: *Sinclair, Roche & Temperley.*

Solicitors for defendants: *Ingledew, Brown, Bennison & Garrett.*

(1) [1935] 1 K. B. 140.

(2) An appeal by the defendants from this decision was dismissed by consent.

R. F. S.

GIBSON *v.* MITCHELL (INSPECTOR OF TAXES).

C. A.

1942
Apr. 28, 29;
May 18.

Revenue—Income tax—Income from possessions other than stocks, shares or rents, out of the United Kingdom—Basis of computation—Income received in the United Kingdom during the preceding year—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *sch. D, case V., r.* 2*—Finance Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 29, *sub-s.* 1*—Income Tax Schedule V. Amendment Order,* 1927 (*St. R. & O.,* 1927, *No.* 81)*—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *ss.* 23, 43.

Sect. 29, sub-s. 1, of the Finance Act, 1926, which enacts that: "Such enactments in the Income Tax Acts as provide that income "tax under sch. D shall in certain cases be computed on the full "amount of the balance of the profits or gains, or on the full "amount of the income upon an average of three years . . . . "shall cease to have effect," and substitutes as the basis of computation "the full amount of the profits or gains or income of "the year preceding the year of assessment," applies to remittances of income arising from possessions, other than stocks, shares or rents, out of the United Kingdom, and taxable under r. 2 of case V. of sch. D:—

So *held* by the Court of Appeal (Lord Greene M.R., du Parcq L.J. and Lewis J.) affirming the decision of Lawrence J. [1942] 1 K. B. 130.

APPEAL from Lawrence J. (1).

At a meeting of the Special Commissioners of Income Tax held on May 30, 1938, J. W. Gibson appealed against assessments to income tax made on him under sch. D to the Income Tax Act, 1918, for the following years in the estimated amounts shown: 1926/1927, 15,000*l.*; 1927/1928, 20,000*l.*; 1928/1929, 20,000*l.*, additional 2330*l.*; 1929/1930, 25,000*l.*, additional 620*l.*; 1930/1931, 25,000*l.*, additional 9266*l.*; 1931/1932 to 1936/1937, 25,000*l.* each year.

In 1926 Mr. Gibson, a civil engineer, was in the Sudan working for S. Pearson & Sons, Ld. As the end of this work approached he was asked by the Sudan Government to carry out in his individual capacity certain work in connection with an extension of the Gezira irrigation scheme. He accordingly left the service of S. Pearson & Sons, and on October 8, 1926, in London, he signed a contract with the Sudan Government. The work on the Gezira scheme began on October 8, 1926, and finished in July, 1932. Mr. Gibson received payment for this work entirely in the Sudan. He had no office in the United Kingdom, and only an accommodation address in

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(1) [1942] 1 K. B. 130.

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London. The sole point of principle in issue before the Special Commissioners was whether Mr. Gibson was assessable in respect of his income under case I. or case II. of sch. D (trade or professional profits not taxed under any other schedule) as claimed by the Crown, or whether liability only arose under case V. of sch. D (income from possessions out of the United Kingdom) as he himself contended. The Commissioners held that the control of Mr. Gibson's business was situated abroad, and during all the years in question was carried on wholly outside the United Kingdom. They discharged the assessments for 1926/1927 and 1927/1928 (during which years Mr. Gibson carried on business in partnership) and also, by agreement, the assessments for the years 1933 to 1937. Further, they held that the liability of Mr. Gibson for the years 1928/1929 to 1932/1933 was under case V. of sch. D and was to be computed, in accordance with r. 2 of case V. (1), only in the amounts of income remitted to the United Kingdom.

The parties disagreeing as to the basis on which the liability should be computed under case V., r. 2, for the years 1928/1929 to 1932/1933, a further hearing took place before the Commissioners on December 4, 1939. The question for determination was whether, as the Crown contended, the provisions of s. 29, sub-s. 1, of the Finance Act, 1926 (2), effectively covered the case of income chargeable under r. 2 of case V. in the same way as it admittedly covered income chargeable under case IV. and under r. 1 of case V.

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(1) Income Tax Act, 1918, sch. D, case V., r. 2: "The tax in "respect of income arising from "possessions out of the United "Kingdom, other than stocks, "shares or rents, shall be computed "on the full amount of the actual "sums annually received in the "United Kingdom from remit-"tances payable in the United "Kingdom . . . . on an average "of the three preceding years as "directed in case I., without any "deduction or abatement other "than is therein allowed."

(2) Finance Act, 1926, s. 29, sub-s. 1: "Such enactments in the "Income Tax Acts as provide that "income tax under sch. D shall in "certain cases be computed on the "full amount of the balance of the "profits or gains, or on the full "amount of the income, upon an "average of three years, and so "much of rr. 1 and 2 of the rules "applicable to case IV. of sch. D "as provides that income tax under "that case shall be computed on "the full amount of the income "which arises, or which has been "or will be received, in the year of "assessment, shall cease to have "effect, and any income tax in "respect of profits or gains or "income chargeable under case I., "case II., case IV., or case V. of "sch. D which would, but for the "foregoing provisions of this sec-"tion, have been computed as "aforesaid shall be computed . . . . "on the full amount of the profits "or gains or income of the year "preceding the year of assess-"ment."

By the Income Tax Schedule V. Amendment Order, 1927, para. xi. of sch. V. to the Income Tax Act, 1918, was amended. Para. xi. relates to statements required to be made "by every person entitled to or receiving income from "possessions out of the United Kingdom to be charged under "sch. D." In the case of such income falling within r. 2 of case V. of sch. D the statement required was of "the full "amount of the actual sums annually received in the United "Kingdom . . . . on an average of the three preceding years." The Order in Council directed that the word "annually" should be omitted and for the words "on an average of the "three preceding years," there should be substituted the words "on the preceding year, or when the income was first received "after April 6 in the preceding year, the amount received in "the year of assessment."

The Commissioners decided that the provisions of s. 29, sub-s. 1, covered income chargeable under r. 2 of case V. and that Mr. Gibson's liability should be computed in accordance with the basis laid down in those provisions and Lawrence J. dismissed an appeal by Mr. Gibson on a case stated by the Commissioners.

Mr. Gibson appealed.

Terence Donovan for Mr. Gibson. Sect. 29, sub-s. 1, of the Finance Act, 1926, by its language omits all reference to income chargeable under sch. D, case V., r. 2. The first part of the sub-section contains words apt to substitute the preceding year's income as a basis for assessment in place of the three years' average as regards cases I. and II. The basis of the preceding year is already established for case III. so that all reference to this is omitted; then the sub-section deals with the taxation under rr. 1 and 2 of case IV. in appropriate words. Case V., r. 1, is also covered by the sub-section. Case V., r. 2, makes the tax in respect of income arising from foreign possessions, other than stocks, shares and rents, computable on the full amount of the actual income received in the United Kingdom, calculated on the three years' average, and there are no apt words in s. 29, sub-s. 1, of the Act of 1924 to vary this, such as are used in regard to case IV., r. 2, to make tax payable on the sum received in the United Kingdom in the preceding year, nor do the concluding words of the sub-section affect the position. It follows that under case V., r. 2, tax is still computed on the three years' average.

It is true that it has since been assumed that income taxable under case V., r. 2, is taxable by reference to the preceding year's income received. Thus the Income Tax Schedule V. Amendment Order, 1927, amended para. xi. of sch. V. to the Income Tax Act, 1918, by altering the form of statement to be made by a person taxable under case V., r. 2, so as to give effect to this view. That order was made under s. 36, sub-s. 2, of the Act of 1921, which only gives power to alter the machinery as that Act required ; and whether this particular amendment was necessary is a matter for the court, even though the order admittedly forms part of the Income Tax Acts. Subsequent legislation can be had regard to for the purpose of solving an ambiguity : see *Colquhoun* v. *Brooks* (1) ; but s. 26, sub-s. 1, is really unambiguous in meaning. The fact that a branch of the legislature puts a particular interpretation on a section does not make that interpretation law. *Ormond Investment Co.* v. *Betts* (2). In any case the alteration made by the order was replaced by the Finance Act, 1927, s. 43, which required a full return of income of the preceding year from all sources. Further, s. 23 of the Act met the difficulty that had arisen over s. 29, sub-s. 1, of the Act of 1926, because it did not deal with the case when a trade or profession had been set up or income had first become chargeable under case V. of sch. D, within two years preceding the year of assessment. That section has been relied on by the Crown but it is contended without justification. Lastly, in *Timpson's Executors* v. *Yerbury* (3), it has been assumed that s. 29, sub-s. 1, of the Act of 1926, applied to case V., r. 2, but that point was not then before the court and had not been argued.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. The obvious intention of the Finance Act, 1926, s. 29, sub-s. 1, was to abolish all three years' averages and in the concluding words of the sub-section reference is made to case V., when according to the argument for the appellant it should have been case V., r. 1. That point is met by reliance on the words " computed as aforesaid " but it is inconceivable that if the intention was to make the change of law inapplicable to case V., r. 2, that case V., r. 1, would not have been inserted in place of case V.

(1) (1889) 14 App. Cas. 493.
(2) [1928] A. C. 143.
(3) [1936] 1 K. B. 645.

What the legislation has done in regard to case IV., r. 2, and case V., r. 2, is to treat the income received in the United Kingdom as the income for taxation purposes and therefore the words " full amount of the . . . . income " in the sub-section are applicable to case V., r. 2, and mean the full amount of the income for the purposes of income tax. In support of this view it may be noted that where the words " full amount "of the . . . . income " occur at the end of the sub-section it is clearly referring to the incomes taxable under case IV., r. 2, and, if so, the words are equally applicable in regard to the income taxable under case V., r. 2. Proviso (*b*) to sub-s. 1 assists the Crown's contention. It is clear that it has always been assumed that the three years' average has been abolished in all cases and having regard to s. 43 of the Finance Act, 1927, it is unnecessary to refer to the Order in Council. It is not contended that s. 43 by itself would suffice to get rid of the three years' average but that it is a guidance in construing s. 29, sub-s. 1, of the Act of 1926, in view of the ambiguity already indicated. [They referred to *Astor* v. *Perry* (1).]

Donovan replied.

Cur. adv. vult.

1942. May 18. The judgment of the court (LORD GREENE M.R., DU PARCQ L.J. and LEWIS J.) was read by LORD GREENE M.R.

LORD GREENE M.R. Before the enactment of s. 29, sub-s. 1, of the Finance Act, 1926, income tax in respect of income arising from foreign possessions out of the United Kingdom, other than stocks, shares and rents, was computed under r. 2 of the Rules applicable to case V. of sch. D of the Income Tax Act, 1918, on the full amount received in the United Kingdom on an average of the three preceding years. The question which arises in this appeal is whether s. 29, sub-s. 1, of the Act of 1926 has been effective to substitute the amount received in the year preceding the year of assessment for the three years' average as the basis of computation. Mr. Donovan who, on behalf of the appellant, argued that this question must be answered in the negative, frankly admitted that the view which he supported was contrary to that which had prevailed in practice ever since the Act of 1926 was passed and also to that taken by the legislature in subsequent

(1) [1935] A. C. 398.

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legislation. This admission does not in any way detract from the seriousness of his argument or the force of the observations which he made in support of it. Whichever view is right, s. 29, sub-s. 1, has been shown to be a singularly ill-drafted enactment and we must do our best to place a reasonable construction upon it.

The method of computing income for purposes of income tax under sch. D before the Act of 1926, varied according to the subject-matter of the tax. The profits of trades under case I. of sch. D and the profits of employment under case II. were computed on a three years' average. Profits from securities out of the United Kingdom under case IV. were computed on the actual profits arising in the year of assessment (r. 1), except in the cases of persons not domiciled in the United Kingdom, British subjects not ordinarily resident there and assurance companies deriving income from investments of their foreign life funds (r. 2). In these excepted cases tax was computed on the amount received in the United Kingdom in the year of assessment. Profits from stocks, shares and rents out of the United Kingdom under case V. were computed on a three years' average (r. 1) while income of the kind with which this appeal is concerned, i.e., income from possessions out of the United Kingdom other than stocks, shares or rents, was computed on the amounts received in the United Kingdom on a three years' average (r. 2). In the case of persons not domiciled in the United Kingdom, British subjects not ordinarily resident there, and assurance companies having foreign life assurance funds income which would otherwise have been computed under r. 1, was to be computed in accordance with r. 2 (r. 3).

It will thus be seen that there was variety of treatment in two respects, namely, the year or period by reference to which the computation was made and the quantum of income upon which the computation was based. Under cases I. and II. the quantum of income was the full amount of the profits. Under r. 1 of case IV. it was the full amount of the profits, subject in the case of income not received in the United Kingdom, to certain special deductions. Under r. 2 of case IV. it was on the full amount received in the United Kingdom. Under r. 1 of case V. it was on the full amount, subject (as in r. 1 of case IV.) to special deductions in the case of income not received in the United Kingdom. Under rr. 2 and 3 of case V., it was on the full amount received in the United Kingdom.

Subject to the present controversy, the object of s. 29, sub-s. 1, of the Finance Act, 1926, was clearly to introduce a uniform rule in place of the first of the varieties of treatment to which we have referred and to cause all income falling under sch. D to be calculated by reference to the year preceding the year of assessment; it was no part of its object to disturb the existing law relating to the second of the two varieties, namely, the quantum of income upon which the computation is based.

The sub-section so far as relevant provides as follows. [His Lordship read the main portion.]

Then follow two provisos of which the first is irrelevant for present purposes. The second, (*b*), which applies to cases IV. and V., deals with special cases where the income first arises in or shortly before the year of assessment. In these cases the computation is to be or may be on the income of the year of assessment. This income is variously described as " the full amount of the income arising within that year," " the income of the year of assessment," " the amount of the "income of that year," but sub-para. iv. provides that "references in this proviso to income which arises or which "arose shall, in cases where income tax is to be computed by "reference to the amount of income received in Great Britain "or Northern Ireland, be construed as references to income "which is or was so received." As will appear, an argument was founded on the language of this sub-paragraph.

The most convenient course will be first to summarize the salient points of Mr. Donovan's argument and then to give our reasons for rejecting it. Mr. Donovan pointed out that the main portion of the sub-section falls into two parts, a repealing part and an enacting part. Taking the repealing part first, it has two sub-divisions the first of which deals generally with cases under sch. D where tax was computed upon a three years' average and the second of which deals with the cases under rr. 1 and 2 of case IV. where tax was computed on the amount arising or received in the year of assessment. If the three years' average has been abolished by the sub-section in the cases falling under r. 2 of case V., it must have been done by the first of these two sub-divisions. But the language used is inapt to produce this result. The repeal is confined to " such enactments in the Income Tax "Acts as provide that income tax under sch. D shall in "certain cases be computed on the full amount of the balance "of the profits or gains, or on the full amount of the income, "upon an average of three years" and this cannot include cases which fall under r. 2 of case V. where tax is computed "on the full amount of the actual sums annually received in "the United Kingdom." When the enacting part of the subsection is examined, this conclusion is confirmed. It deals with the cases where, but for the foregoing provisions, tax "would "have been computed as aforesaid," that is to say, on the "full amount" of the income and enacts that tax shall be computed "on the full amount of the profits or gains or "income of the year preceding the year of assessment." If the sub-section applies to cases falling under r. 2 of case V., the result will be not only that the year preceding the year of assessment has been substituted for the three years' average, but that tax must now be computed, not upon the amounts received in the United Kingdom, but upon the full amount of the income whether received in the United Kingdom or not, a change of the law which no one has ever suggested to have taken place. This is confirmed by a reference to the proviso. There, in sub-para. iv., the legislature has expressly said that the references in the earlier part of the proviso to "income "which arises or which arose" are, in cases where the computation is based on the amount received in Great Britain or Northern Ireland to be "construed as references to income "which is or was so received." If the legislature in the main part of the sub-section had intended the words "full amount "of the income" and similar words to be construed as meaning the amount received in Great Britain or Northern Ireland in cases where that amount formed the basis of computation, it is impossible to suppose that it would not have said so as it did when it came to enact the proviso. Mr. Donovan admitted that his construction would have the effect of limiting the application of the enacting part of the main portion of the sub-section to cases arising under r. 1 of case V. and that the reference to case V. in that part must be read as a reference to r. 1 of case V. only. This must be added to the other reasons for rejecting Mr. Donovan's argument which we will give presently.

Mr. Donovan then dealt with the subsequent legislation. He admitted that if, but only if, the meaning of s. 29, sub-s. 1, is ambiguous, reference may be made to subsequent legislation. But he maintained that there is no ambiguity and therefore that the subsequent legislation can show nothing more than that the legislature took a wrong view of the meaning of its own enactment. The subsequent legislation to which reference was made was as follows: sub-s. 2 of s. 36 of the Finance Act, 1926, provides for making by Order in Council such amendments of the forms of statements, lists and declarations contained in the fifth schedule to the Income Tax Act, 1918, "as appear to His Majesty to be necessary to give effect to the "provisions of this Part of this Act and that schedule shall "have effect as amended by any order so made." These provisions came into operation on April 5, 1927, and in order to prepare for them an Order in Council was made on February 7 of that year. That order specified the amendments to be made in the fifth schedule to the Income Tax Act, 1918, and directed that the fifth schedule should have effect as so amended. The relevant paragraph of the fifth schedule is No. xi. which sets out the statement to be made by persons entitled to or receiving income from possessions out of the United Kingdom to be charged under sch. D. In its unamended form the schedule required a statement to be furnished showing in the case of foreign possessions other than stocks, shares or rents (i.e., those covered by r. 2 of case V.), the full amount of the sums received in the United Kingdom on an average of the three preceding years. The amendment introduced by the Order in Council substituted the amount received in the year preceding the year of assessment for the three years' average. It is plain, therefore, that this Order in Council was made on the footing that s. 29, sub-s. 1, of the Act of 1926 had, in regard to cases under r. 2 of case V., both substituted the preceding year for the three years' average and preserved the amount received in the United Kingdom as the basis of the assessment. This para. xi. of the fifth schedule as so amended was repealed by the Finance Act, 1927 (see sixth schedule to that Act, part I.), and under s. 43 of that Act returns in a prescribed form can be called for of all sources of income and of the amount derived from each source for the year preceding the year of assessment; in order to make the matter doubly sure, the section contains a proviso that "the "computation of income shall be made by reference to the "year preceding the year of assessment and not by reference "to any other year or period." This section, therefore, is framed on the same basis as the Order in Council so far as regards the effect of s. 29, sub-s. 1, of the Finance Act, 1926, on cases falling under r. 2 of case V.

We will now state as concisely as we can the principal reasons why in our opinion the argument of the appellant cannot be accepted. It depends upon giving a literal meaning to the words " full amount " in the relevant contexts and relating them only to cases where tax is computed on the full amount of the income as distinct from cases where it is computed on the full amount received in the United Kingdom. If it appears that the words " full amount " must in any of the cases dealt with in the sub-section be construed as including cases where the computation is on less than the full amount, particularly if it includes a case where tax is computed by reference to the amount received in the United Kingdom, the whole basis of this argument is destroyed. An analysis of the sub-section shows two things: (*a*) that in the reference to r. 1 of case IV. in the repealing part of the sub-section " full "amount " must mean something less than full amount since under that rule the computation is made after certain special deductions have been made, (*b*) that in the reference to r. 2 of case IV. the phrase in the repealing part " full amount of the "income which arises or which has been or will be received in "the year of assessment " must of necessity refer to the full amount " received in the United Kingdom in the year of "assessment." As this is quite clearly so, it follows that the phrase in the enacting part " the full amount of the profits or "gains or income of the year preceding the year of assessment " must in regard to cases falling under r. 2 of case IV. be construed as meaning the full amount received in the United Kingdom. Now if the enacting part must be given this meaning in relation to r. 2 of case IV., there is no reason why it should not be given the same meaning in relation to r. 2 of case V. It follows from this that a corresponding meaning can be given to the phrase " full amount " in the first limb of the repealing part under which case V. falls. If the specific words of the sub-section which give rise to the difficulty are examined in the light of these considerations, it will be found that they are capable of a construction agreeable to the contention of the Crown. It was argued by the Attorney-General that the true emphasis of the language must be placed on the contrast between " an average of three years " and " the year of "assessment " on the one hand and " the year preceding the "year of assessment " on the other; the reference to " full "amount of the income " are merely given for the purpose of identification and are not intended to exclude from the scope of the sub-section cases where the " full amount " which is subjected to tax is "the full amount of the actual sums "annually received in the United Kingdom" as under r. 2 of case V. In all cases the tax is charged on "full amounts." Next, the words in the enacting part "as aforesaid" refer back only to the emphatic words "average of three years" and "year of assessment." Moreover, the proviso appears to assume that cases falling under r. 2 of case V. had been dealt with in the main part of the sub-section since, unless the law had been altered by the main part of the sub-section, it would have been inappropriate to refer to such cases in a proviso. In the proviso itself "full amount of the income" and "income" are used indifferently as meaning the same thing, which show that no particular importance is to be attributed to the word "full."

If the main part of the sub-section relates to r. 2 of case IV., which it clearly does, Mr. Donovan's argument must, as he admitted, involve reading into the enacting words at the end of that part some such words as "or which were or will be "received in the United Kingdom as the case may be." We see no necessity to read in any such words even in the case of r. 2 of case IV. If it were necessary to insert them, there is just as much reason for inserting them in the case of r. 2 of case V. also.

While appreciating the unhappiness of the language used, we have come to the conclusion that the appellant's construction fails without the necessity of referring to the subsequent legislation. If, however, it should be thought that the language of the sub-section is at the best ambiguous, the ambiguity can be conclusively resolved by referring to that legislation which puts the matter beyond doubt.

Lawrence J. was right in his conclusion and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Culross & Co.; Solicitor of Inland Revenue.*

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Apr. 29, 30; May 1, 4, 21.

ALLCHIN (INSPECTOR OF TAXES) *v.* COULTHARD.

Revenue—Income tax—Local authority—Interest on loan for general purposes—Payment out of general rate fund—Retention of tax—Profits of undertaking included in fund—" Profits or gains brought " into charge to tax "—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedule Rules, rr.* 19, 21—*South Shields Corporation Act,* 1935 (25 *&* 26 *Geo.* 5, *c.* xcvi.), *ss.* 112, 113, 114, 115, 116.

The phrase " profits or gains brought into charge " as used in rr. 19 and 21 of the General Rules Applicable to All Schedules to the Income Tax Act, 1918, does not indicate the cash resources out of which the payment of the interest is in fact made, but a fund in the accountancy sense of taxed profits up to but not exceeding the amount of the assessment ascertained for the purpose of an account between the taxpayer and the revenue and deemed to be in his hands, to which the payment of the interest is to be debited. No profits which cannot be lawfully applied to the payment of the interest can be treated by the taxpayer as forming this fund or any part of it, but subject to this, apart from special circumstances, instances of which are provided by *Birmingham Corporation* v. *Inland Revenue Commissioners* [1930] A. C. 307 and *Central London Ry.* v. *Inland Revenue Commissioners* [1937] A. C. 77, the taxpayer is entitled to treat the interest as having been paid out of that fund, no matter out of what cash resources he in fact paid it.

S. corporation paid out of their general rate fund, which consisted partly of untaxed income (namely, the rates collected) and partly of profits from its undertakings duly assessed to income tax, interest on a loan raised for the purpose of their electricity and transport undertakings and general purposes, deducting income tax in the usual way. The corporation claimed, under the provisions of the South Shields Corporation Act, 1935, to treat the assessed profits of the electricity and transport undertakings as part of the assessed profits out of which the interest was paid and to retain the amount of tax paid on those profits :—

Held, reversing the decision of Lawrence J., that by the provisions of the Act the profits of those undertakings could lawfully be applied to the payment of the interest on the whole of the loan, and, consequently, those profits as assessed to income tax formed part of the profits brought into charge out of which the interest was paid or deemed to be paid, notwithstanding that it appeared from the accounts of those undertakings, kept separately as required by the Act, that the surplus revenues of those undertakings had been treated as applied to certain specified purposes of those undertakings.

CASE stated by the Special Commissioners of Income Tax.

Appeal from Lawrence J.

In 1935–1936 South Shields Corporation, of which Coulthard was the treasurer, paid in interest on borrowed money the sum of 132,396*l.* Part of the money had been borrowed for purposes connected with the electricity and transport undertakings of the corporation and part for their general purposes. On making the payments they deducted tax in the usual way. In the same year their profits or gains brought into charge, i.e., assessed to tax, amounted to 91,504*l.* They admitted their liability to account to the Crown for the tax on the difference, namely, 40,892*l.* In the sum of 91,504*l.* there were included the profits of the electricity and transport undertakings of the corporation as assessed to tax for the year. After deducting from these assessed profits a sum equal to the interest on moneys borrowed for the purpose of the undertakings there remained 12,628*l.* in respect of the assessed profits of the electricity undertaking and 2589*l.* in respect of the assessed profits of the tramway undertaking, amounting together to 15,217*l.* The corporation were assessed in respect of the interest in the sum of 56,109*l.* against which assessment they appealed to the Special Commissioners, contending that the two sums amounting to 15,217*l.*, must be deemed to have been applied towards payment of the interest which they paid during the year on moneys borrowed for their general purposes, and that they were entitled to retain the corresponding amount of tax.

The Special Commissioners decided in favour of the corporation. The Crown appealed, contending (1.) that profits of the undertakings could not lawfully be applied in payment of interest on money borrowed for purposes of the corporation other than those connected with the undertakings themselves; (2.) that, in any event, on the facts, the surplus profits of the undertakings were not so applied, but were dedicated by the corporation exclusively to the purposes of the undertakings. The findings of the Special Commissioners were reversed by Lawrence J., who considered that the case was governed by *Sugden* v. *Leeds Corporation* (1) and upheld the first contention of the Crown. The corporation appealed.

Tucker K.C., *Fitzgerald K.C.* and *Terence Donovan* for the corporation.

Sir D. P. Maxwell Fyfe S.-G. and *R. P. Hills* for the Crown.

Cur. adv. vult.

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1942. May 21. LORD GREENE M.R. read the following judgment. I am authorized by DU PARCQ L.J. to say that he has read the judgment which I am about to deliver and that he agrees with it.

I am of opinion that the Special Commissioners came to the right conclusion and that their decision should be restored. Apart from certain notorious difficulties as to the true meaning and operation of rr. 19 and 21 of the General Rules Applicable to All Schedules to the Income Tax Act, 1918, the question turns ultimately on the construction of certain sections in the South Shields Corporation Act, 1935, but to understand the relevant provisions of that Act it is necessary to examine briefly the law as it existed before the Act in relation to the receipts and expenditure of the corporation and in particular the profits of the two undertakings.

The public general Act by which the corporation were governed in respect of these matters was the Local Government Act, 1933. By s. 185 of that Act all receipts of the council of a borough are to be carried to the general rate fund of the borough and all liabilities falling to be discharged by the council are to be discharged out of that fund. Special provision was, however, made to secure that existing statutory rules as to the application of surplus revenue arising from undertakings should be preserved. This provision is contained in s. 194 of the Act which says that nothing in that part of the Act is to be deemed to require or authorize a local authority to apply or dispose of such surplus revenue otherwise than in accordance with the provisions of any enactment or statutory order relating to the undertaking. The effect of this was that, notwithstanding that all receipts and expenditure were to be paid into and out of the general rate fund, a borough council could not apply the surplus revenue of any of its undertakings for any purpose not authorized by the statute or order governing the undertaking. If, for example, a council had surplus revenue from an electricity undertaking which was only applicable for the purposes of the undertaking, it could not apply it in payment of interest on money borrowed for its general purposes. Consequently, it could not claim to retain tax deducted from such interest on the ground that the interest was or must be deemed to have been paid out of the taxed income of the undertaking: c.f. *Sugden* v. *Leeds Corporation* (1). Before the passing of their Act of 1935 the

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rights and obligations of the corporation in respect of the application of the surplus revenue of their electricity and transport undertakings were governed by statutory provisions. It is not necessary to set these out, since it is conceded by Mr. Tucker, on their behalf that, had it not been for the Act of 1935, it might have been illegal for them to apply the surplus revenues with which this appeal is concerned in payment of interest on loans not raised for the purpose of the undertakings, with the result that the principle of *Sugden's* case (1) would have governed the present controversy. I shall not stop to consider whether or not this would have been the case, but I will assume it. On that basis the question which we have to decide is whether the position has been altered by the Act of 1935.

The case of the corporation is that all previously existing restrictions on the application of the surplus revenues of the two undertakings were swept away by certain sections of their Act of 1935 which it is now necessary to consider. The first of these sections is s. 112 which provides that, notwithstanding anything contained in any other Act or order, all moneys received by the corporation, including in particular all money received on account of the revenue of any of the corporation undertakings and all interest on reserve and other funds, are to be carried to and form part of the general rate fund, and that all payments and expenses in respect of any such undertaking or the other activities of the corporation shall be paid out of the same fund. Sect. 113 provides for the keeping of separate accounts in respect of each undertaking and for the form in which such accounts are to be kept. Sect. 114 empowers the corporation in certain events to apply out of the general rate fund a sum not exceeding the amount of the specified excess revenue of any undertaking in any year to certain specified purposes connected with the undertaking, including the provision of a reserve fund and deals with the application of such reserve fund. Sect. 115 contains special provisions for the electricity undertaking in substitution for certain directions contained in the Electric Lighting Order of 1891 under which that undertaking is carried on. Sect. 116 repealed the existing statutory provisions governing the application of the revenues of the undertakings and the method of keeping their accounts. These sections are long and complicated, and I have not thought it necessary to set them

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out in detail. It is, however, right to observe that they are drafted with great care and skill with the obvious intention of securing to the corporation the advantages in respect of income tax which they now claim. In my opinion, they are effective for that purpose.

Lord Greene M.R.

The effect of the repeal contained in s. 116 of the Act was to abolish all existing statutory regulations and restrictions as to the application of the surplus revenues of the undertakings. It is contended on behalf of the Crown that ss. 112 to 115 reimposed those restrictions or, rather, imposed corresponding restrictions in relation to the application of the surplus revenues of the undertakings so as to make it still illegal for the corporation to apply them in payment of interest on general purpose loans—in other words, that the law for present purposes is unchanged and the principles of *Sugden's* case (1) still apply. An examination of the language of the section shows this contention to be unfounded, and, accordingly, there is no scope for the operation of s. 194 of the Local Government Act, 1933. The effect of the relevant sections of the Act of 1935 may, I think, be summarized as follows. All receipts and expenditure must be paid into and out of the general rate fund, but for the purpose of the internal accounts of the borough separate accounts showing the specified particulars must be kept in respect of each undertaking. This was obviously necessary, since, if the only account kept had been that of the general rate fund, it would have been impossible to ascertain the financial position of the undertakings, but the obligation to keep these accounts imposes no sort of restriction on the corporation as to the way in which they are to deal with the profits of the undertakings, any more than would be the case with an ordinary trading company which, for purposes of convenience, treated different branches of its undertakings as separate entities for accountancy purposes. Sect. 114 has as its marginal note the words "Application "of revenue of undertakings," and the same phrase appears in the preamble to the Act. I cannot attach to this phrase the importance which counsel for the Crown suggest that it bears. It is, in fact, a misdescription of the contents of the section. The section gives no directions as to the application of revenue as such. It merely empowers the corporation, when there is a surplus, to apply sums out of the general rate fund for specified purposes of the undertaking which shows

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the surplus. It is impossible to say of sums so applied that they are the profits of the undertaking. They are no more the profits of the undertaking than they are the proceeds of the rates. The actual money represented by the surplus revenue of the undertaking does, of course, go to swell the amount standing in the general rate fund, but its identity is lost, and it cannot for any relevant purpose be identified with sums which, under s. 114, the corporation elect to apply out of the general rate fund for the purposes of the undertaking. Moreover, there is nothing compulsory about the application, and it is not true to say that there is anything in the section which makes it illegal for the corporation to apply the profits of their undertakings for any purpose, including the payment of interest, to which their moneys can otherwise lawfully be applied. There is no need to deal specially with s. 115, which carries the matter no further.

The result down to this point is as follows. At the date when the interest was paid, the general rate fund was made up of moneys which in part were derived from untaxed income (rates) and in part from the profits of the undertakings for the year in question. Out of that fund the interest was paid. The profits of the undertakings for the year had been or would in due course be subjected to tax although the profits as assessed to tax would not be the same in amount as the actual profits shown by the accounts. They were in fact less. It is convenient here to refer to the tests laid down by Lord Atkinson in *Sugden's* case (1), which, in the Crown's contention, must be satisfied before the corporation can succeed. Lord Atkinson says that before the taxpayer can retain the tax deducted, he must be able to answer affirmatively two questions: (1.) Has the interest been in fact paid or must it in the circumstances of the case be taken to have been paid out of profits or gains brought into charge, i.e., out of the so-called "taxed fund." (2.) Was it lawful to pay them out of the fund? For the reasons which I have given I am of opinion that the second of these questions must be answered in the affirmative. It is in the case of local authorities that this question usually arises. The reason lies in the peculiar constitution of these bodies. Unlike the ordinary trading company, their income is in part derived from a source not liable to tax, i.e., rates. That part which is derived from their undertakings is taxable. The legislature has in the past imposed restrictions on the application of the profits of their undertakings, with the result that those profits had to be kept distinct from their other receipts, just as if a local authority had been several legal entities instead of one. Once those restrictions are removed, as in the present case, the authority ceases to be divided into separate compartments in this way and all its receipts become lawfully applicable for all its purposes. It is thus placed in precisely the same position in this respect as any other person.

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(1) [1914] A. C. 483.

It is on the first of Lord Atkinson's questions that the alternative contention of the Crown is based. It is said that when the accounts of the undertakings are examined it will be found that the profits which they earned in 1935–1936 were all in fact applied for the purposes of the undertakings themselves and that no part of them was in fact applied in payment of the interest with which we are concerned. This argument is, in my opinion, based on a misconception of the meaning of payment out of a taxed fund. On a previous occasion I ventured to point out some of the difficulties which that and similar phrases appeared to me to occasion: *Fenton's Trustee* v. *Inland Revenue Commissioners* (1). That I had good ground for doing so appears from the opinion of Lord Macmillan delivered later in the same year in *Central London Railway* v. *Inland Revenue Commissioners* (2) in which the other members of the House of Lords concurred. Much of the obscurity which surrounds this matter is due to a failure to distinguish the two senses in which the phrase "payment out of a fund" may be used. The word "fund" may mean actual cash resourses of a particular kind (e.g. money in a drawer or a bank), or it may be a mere accountancy expression used to describe a particular category which a person uses in making up his accounts. The words "payment out of" when used in connection with the word "fund" in its first meaning connote actual payment, e.g. by taking the money out of the drawer or drawing a cheque on the bank. When used in connection with the word "fund" in its second meaning they connote that, for the purposes of the account in which the fund finds a place, the payment is debited to that fund, an operation which, of course, has no relation to the actual method of payment or the particular cash resources out of which the payment is made. Thus, if a company makes a payment out of its reserve fund—an example of the second meaning of the word "fund"—the actual payment is made by cheque drawn on the company's banking account, the money in which may have been derived from a number of sources. The phrase "reserve fund" only has a meaning as indicating the item in the company's accounts to which it decides to debit the payment. It will be seen, therefore, that to speak of an actual payment being made out of a fund in the second sense is really a misuse of language. A fund in the second sense is merely an accountancy category. It has a real existence in that sense, but not in the sense that a real payment can be made out of it as distinct from being debited to it. Unless these two meanings of the phrase "payment "out of a fund" are kept distinct, much confusion of thought must ensue. A real payment cannot be made out of an imaginary fund: per Lord Macmillan in the *Central London Railway* case (1).

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(1) [1936] 2 K. B. 59, 80 et seq.

(2) [1937] A. C. 77.

In applying these considerations to the requirements of r. 21 that the interest must have been payable and paid out of profits brought into charge to tax, it will be seen that the word "profits" cannot (except in the possible case of income taxed at the source) be construed as indicating the cash resources out of which the payment is in fact made. The word can only be used in the accountancy sense of a fund of profits ascertained for the purposes of an account between the taxpayer and the revenue. As the result of taking that account the taxpayer is deemed to have in his hands a fund of taxed profits up to, but not exceeding, the amount of the assessment. Accordingly, it becomes necessary for the purpose of giving effect to rr. 19 and 21 to draw up a further account as between the taxpayer and the revenue. On the one side is entered the interest paid, and on the other side the "taxed "fund," which may consist of profits as assessed to tax under different schedules. The taxpayer is not entitled to bring in on this side of the account a taxed fund if the profits in respect of which the relevant assessment is made cannot lawfully be applied in payment of the interest. Subject to this, in the absence of special circumstances to which I will refer later, the taxpayer is, in my opinion, entitled to treat the interest entered on one side of the account as having been paid out of the items of taxed profit entered on the other side. In the accountancy sense, he has paid it, since as between him and the revenue he is entitled to have the account drawn in this way and to debit his payments to the taxed fund. It follows from this that (again apart from special circumstances) the question out of what cash resources was the payment made is entirely irrelevant. A trader may spend the whole of his profits for the year in buying himself a house, with the result that he has to borrow money to pay his mortgage interest. This does not disentitle him from saying that, as between himself and the revenue, he is entitled to debit the interest paid to the fund representing the amount in which his profits for the year are assessed. To hold otherwise would be to make nonsense of rr. 19 and 21. Nor can the way in which, for his own convenience, he chooses to keep his accounts deprive him of this right. If he carries on two businesses and chooses to keep their accounts distinct, he may in those accounts show the profits of one business as having been wholly applied in buying capital assets for that business and charge the whole of the interest which he is liable to pay to, for example, a reserve account in the other business representing profits of past years, but, in taking the account as between himself and the revenue, he is entitled to treat the assessed profits of the first business as available for the payment of the interest. To speak of this as re-writing the trader's accounts is a misdescription. His domestic accounts stand, and there is no question of re-writing them. The account which is drawn up between himself and the revenue is a totally different account drawn up for totally different purposes and the figure representing taxed profits which appears in it is a statutory and (except in the case of profits taxed at source) not an actual figure.

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(1) [1937] A. C. 77.

I have thought it desirable to explain at some length the principles which appear to me to underlie questions of this nature. I might perhaps have contented myself with citing some of the passages in the numerous authorities in which the matter has been discussed, notably the speech of Lord Atkinson in *Sugden's* case (1), and that of Lord Macmillan in the *Central London Ry.* case (2), to which I have already referred, but the nature of some of the arguments presented to us showed that the subject is still regarded as wrapped in considerable obscurity and that must be my excuse. If I have correctly grasped these principles, it follows that, in the present case, the fact that the corporation in their domestic accounts have chosen, without any legal compulsion, to show

(1) [1914] A. C. 483.

(2) [1937] A. C. 77.

the profits of their undertakings for the year as having been wholly applied for the purposes of the undertakings does not in any way disentitle them from saying that the interest has been or must be deemed to have been paid pro tanto out of the taxed fund at which these profits are quantified by assessment. Once it appears that the profits in respect of which the assessment is made are in their nature legally applicable for the purpose of paying the interest they are entitled to claim that it was in fact paid or must be deemed to have been paid out of those profits as assessed so far as they will go. They are in precisely the same position as the trader with two businesses to whom I have referred, the only difference being that part of their income, namely, that derived from rates, is not liable to tax. This, however, does not entitle the Crown to say that the interest must be deemed to have been paid out of the rates. It is, in fact, as true to say that the rates have been applied for the purposes of the undertakings, leaving the profit available for payment of the interest.

I have referred to the fact that special circumstances may exist which will provide a different result. I do so by reason particularly of two decisions on which counsel for the Crown placed great reliance. In my opinion, however, they have nothing to do with the present case. The circumstances in each case were very special. In the *Central London Ry.* case (1), the railway company had statutory powers to do what it would not have been entitled to do, namely, charge the interest on certain debenture stock to capital. This power it elected to exercise. The figure at which its profits were assessed to tax was large enough to cover the interest and it claimed to be entitled to treat the interest as having been paid out of those profits. It was held that it was not entitled to do so. Now, the fact that the company chose to charge the interest to capital might at first sight appear to be a mere matter of domestic accountancy. Had it charged the interest to revenue, as it was perfectly entitled to do, it could unquestionably have retained the tax, but by taking the course which it did it set the amount of its profits free for payment of dividend. Its action, as Lord Macmillan said (2) was much more than a mere matter of domestic accountancy. He went on to explain why this was so. The effect of charging the interest to capital was to swell the dividend fund on the distribution of which the company retained a larger amount of tax than they would have retained if the interest had been

(1) [1937] A. C. 77.

(2) [1937] A. C. 89.

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charged to revenue and the dividend fund in consequence reduced. They could not at one and the same time claim to enjoy this larger retention and treat the interest as chargeable, as between themselves and the Crown, to revenue account. The other case is *Birmingham Corporation* v. *Inland Revenue Commissioners* (1). There the corporation's expenditure on a housing scheme, including interest on loans raised for the purposes of the scheme, exceeded the receipts and the corporation claimed to treat the interest on the loans as having been paid out of its taxed income. For the purpose of claiming the exchequer subsidy, the interest paid on the housing loan was brought in by the corporation at the gross and not the net figure. Lord Buckmaster pointed out that "The accounts "were prepared for a department of the Crown to whom, "acting through another department, the tax was payable, "and so regarded were prepared upon the footing that the "tax was unpaid, with the result that either the creditor was "still liable for the tax or that, if it had been deducted, it was "retained to satisfy his liability in that respect." The decision turned entirely on the special nature of the exchequer subsidy and the action of the corporation in basing its claim for subsidy on the assertion that it was out of pocket to the extent of the gross amount of the interest.

These cases, as I have said, turned on very special facts. In the present case, when the facts are analysed and the sections of the Act of 1935 correctly construed, no special circumstances appear which would prevent the corporation from claiming that the interest must be treated as having been paid pro tanto out of their taxed income. Lawrence J. appears to have taken a different view as to the construction of the Act of 1935. My reasons for differing from him sufficiently appear. In my opinion, the appeal succeeds and the decision of the Special Commissioners must be restored.

LEWIS J. I have had an opportunity of reading the judgment which the Master of the Rolls has just delivered; I agree with it and I have nothing to add.

Appeal allowed.

Solicitors for corporation: *Speechly, Mumford & Craig, for Town Clerk, South Shields.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) [1930] A. C. 307.

P. J. B.

ROBINSON *v.* LONDON BRICK COMPANY.

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May 21, 22;

June 12.

Workmen's compensation—Death of workman—Children's allowance—Widow's claim satisfied independently of the Workmen's Compensation Act, 1925—*Workmen's Compensation Act*, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 8, *sub-s.* 1.

A workman died as the result of an accident arising out of and in the course of his employment, leaving a widow and an infant child. The widow recovered compensation under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, and so was debarred from making any claim under the Workmen's Compensation Act:—

Held, that the infant child was entitled to children's allowance under s. 8, sub-s. 1, of the Workmen's Compensation Act, 1925, as well as the lump sum payable under the sub-section.

Avery v. *London and North Eastern Ry. Co.* [1938] A. C. 606, applied.

Appeal from the judge of the Peterborough county court sitting as an arbitrator.

On January 22, 1941, William Arthur Robinson died as the result of an accident arising out of and in the course of his employment by the defendant company. He left a widow and an infant son, aged about one year. The widow made claims under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, which were satisfied by the payment to her of 1750*l.*, and she was, therefore, debarred from making any further claim. The infant son then made a claim through his next friend under the Workmen's Compensation Act, 1925, for compensation to the extent of a lump sum of 300*l.*, plus children's allowance, giving credit for 9*l.* 8*s.* 6*d.* paid to the workman before his death. The county court judge made an award in the terms of the infant's claim. The company appealed.

Sellers K.C. and *Duckworth* for the company. The county court judge ought not to have awarded to the infant the children's allowance as well as the lump sum of 300*l.*, as to which no question arises. This allowance is payable under s. 8, sub-s. 1, of the Workmen's Compensation Act, 1925, in respect of a child or children under the age of fifteen of a deceased workman if he also left " a widow or other member of his family (not "being a child under the age of fifteen) wholly or partially "dependent upon his earnings." In the present case the

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widow lost her right to claim compensation under the Workmen's Compensation Act because she recovered damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934, and therefore, to prevent duplication, her existence as a dependant must be disregarded and the children's allowance is not payable. Where a widow has private means and so is not dependent on her husband's earnings, an infant dependant can recover 300*l.* but no more: see *Avery* v. *London and North Eastern Ry. Co.* (1).

Beney for the infant. Both the widow and the infant child were dependants of the workman at the date of his death and it has never been suggested that the fact that a dependant has recovered damages under the Fatal Accidents Acts and the Act of 1934 independently of the Workmen's Compensation Act deprives another dependant of his right to claim under the Act. Section 29 does not deal in any way with the amount of compensation recoverable, and, therefore, does not affect the position. In *Gill* v. *Fortescue (N.) & Sons, Ld.* (2) and *Avery* v. *London and North Eastern Ry. Co.* (1), it was held that the children of deceased workmen were entitled to recover full compensation under the Workmen's Compensation Act although the widows had recovered, or were about to claim, compensation under the Fatal Accidents Acts. That principle applies to this case, and the award is right.

Duckworth replied.

Cur. adv. vult.

1942. June 12. The following judgments were read.

Lord Greene M.R. The question which arises is one which was mentioned in argument before the House of Lords in *Avery* v. *London and North Eastern Ry. Co.* (1) but did not then require decision. Reference was made to it in the speeches of Lord Atkin and Lord Macmillan. Lord Atkin, without expressing any concluded opinion, inclined to favour the view for which the company here contend. Lord Maugham L.C., Lord Russell of Killowen and Lord Thankerton expressed their general agreement with the opinion of Lord Atkin without, however, referring expressly to this particular matter. Lord Macmillan merely stated the problem without any indication of his views on it.

The question, which is one of considerable difficulty, arises

(1) [1938] A. C. 606.

(2) (1913) 6 B. W. C. C. 577.

in this way. Sect. 8 of the Workmen's Compensation Act, 1925, deals with the amount of compensation to be paid in fatal cases. First of all, there is to be a lump sum calculated in the manner specified, but not exceeding in any case 300*l.* This lump sum I may for convenience call the basic sum. In the present case this maximum figure of 300*l.* is admittedly payable under this head. But in certain cases an additional sum (called " the children's allowance "), the amount of which varies according to circumstances, is also payable, and where it is payable the basic sum and the children's allowance are to be added together and dealt with as a single sum. In the present case the children's allowance, if payable, is agreed to be the sum of 228*l.* 12*s.* The circumstances in which the children's allowance is payable in addition to the basic sum are, so far as relevant, thus expressed in sub-s. 1 of s. 8: "if the workman leaves a widow . . . . wholly or partially "dependent upon his earnings, and in addition leaves one or "more children under the age of fifteen so dependent." The question may be thus stated. Is the addition of the children's allowance to the basic sum contingent on the mere existence of a dependent widow or must it be paid even when the widow is not claiming and cannot claim under the Workmen's Compensation Act? The argument for the infant is short and simple. The section, it is said, lays down one requirement and whenever that is satisfied the children's allowance must be paid. That requirement is that a specified state of fact must exist, namely, there must be in fact a dependent or partly dependent widow and a dependent or partly dependent child under fifteen. Once this is found to be the case the children's allowance is payable and it is not legitimate to write into the sub-section words which would make the obligation to pay it dependent on the widow being or having the right to be a claimant.

The decision in *Avery* v. *London and North Eastern Ry. Co.* (1) lays a foundation for this argument in a way which I will endeavour to explain. In that case the widows had claimed damages under the Fatal Accidents Acts and the Employers' Liability Act. The children were not parties to those claims and the widows recovered the amounts to which under those Acts they were entitled without taking into account any loss suffered by the children. The children in their turn claimed compensation under the Workmen's Compensation Act, and,

(1) [1938] A. C. 606.

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in awarding the compensation, no account was taken of the fact that the widows had recovered damages. The House of Lords held that this was the correct procedure. This court, whose decision was reversed, thought that both the damages and the compensation must be regarded as being awarded to groups and not to individual claimants. The House of Lords, however, held that persons who elect to enforce their rights under one rather than under the other of the relevant statutes are entitled to recover up to the maximum permitted by the statute of their choice: per Lord Russell of Killowen (1). Lord Macmillan stated the effect of the decision in the following words (2): "The option under s. 29, sub-s. 1, is thus personal "to each dependant of a deceased workman, and consequently "there may arise out of one and the same accident concurrently "proceedings under the Workmen's Compensation Act and "proceedings independent of that Act, brought by different "dependants of the deceased workmen. The principle of "one accident, one action, is gone." This decision makes it clear that the present infant is entitled to claim the maximum compensation payable in the circumstances without regard to the fact that his mother has already been paid damages. When that maximum is ascertained he is not liable to have it diminished by reason of the fact that, had the widow also been a claimant, she would have been entitled to share in it. The compensation is not to be regarded as payable to a group consisting of mother and child. But this provides no answer to the present question which is, what in the circumstances is the maximum sum? Is it the basic sum or is it the basic sum plus the children's allowance? The answer to this question turns entirely on the construction of the relevant words of the statute. Whatever the answer may be, *Avery's* case (3) decides that the right of the infant to receive the maximum sum which the statute gives him is not affected by the receipt of damages by the widow. Beyond this the decision gives no assistance save what may be obtained from the dicta which I have mentioned.

If the words relied on by the infant are to be read in their literal sense, I can see no answer to his argument. The language is plain, simple and unqualified and in the absence of a sufficient context to limit its meaning he is entitled to succeed. Is there a context which qualifies the meaning so as to make the children's allowance payable only when the widow is (or, possibly, when she can be) a claimant? I have endeavoured to find such a context, since if the infant is right, the result, to say the least of it, will be startling, but I have failed to find anything which would justify me in cutting down words of so clear and precise a meaning. Lord Atkin, in the passage to which I have referred, said as follows (1): "I incline to think that those provisions only relate to "dependants who are in fact claimants, but the matter does "not arise in the present case, and I express no considered "opinion about it." I have given respectful attention to this observation, but now that the precise question falls for decision I find myself unable to follow it. I have very little doubt that the legislature was throughout contemplating a simple procedure by which all members of the family would unite in one claim and did not imagine that any such ingenious severances would take place as those which occurred in *Avery's* case (2) and the present case. But *Avery's* case (2) has decided that this intention, if it was the intention, has not been carried into effect by the language of the statute. The practical result of this decision was itself curious and unexpected. If it leads to another curious and unexpected result in the present case that must not cause surprise. Indeed, *Avery's* case (2) largely, if not entirely, destroys the force of the argumentum ab inconvenienti in the present case.

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(1) [1938] A. C. 616.

(2) Ibid. 621.

(3) Ibid. 606.

The context relied on by the company consists of the use of the word "additional," the word "allowance" itself, and other provisions of the section which are as follows. One is the direction that the basic sum and the children's allowance are to be added together and dealt with as a single sum. The only object of this, it is said, is to negative any suggestion that the basic sum is to belong to the widow and the children's allowance to the child or children. The two sums are to be treated as one sum which will thus be subject under s. 21, sub-s. 2, of the Act to whatever apportionment may be thought proper. If sub-s. 1 of s. 8 had contemplated that the children's allowance would be payable when the only claimant was a child and the mother was precluded from claiming, the direction as to treating the two sums as a single sum would have been inappropriate to such a case. But against this it must be observed that as Goddard L.J. points out in the judgment which he is about to read, there might be a child over

(1) [1938] A. C. 616.

(2) [1938] A. C. 606.

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fifteen who combined in the claim with a child or children under fifteen, in which case, even if the company are right, the children's allowance would be payable and the provision for treating the two sums as a single sum would be necessary. The other indication is said to be found in para. (ii.) of sub-s. 3 of s. 8. That paragraph provides that, if the widow and children or any of them were partially dependent on the workman's earnings, the children's allowance is to be less than it would have been if they had all been wholly dependent. If the infant is right, this would have a curious result. The question whether a widow was wholly or partially dependent on her deceased husband's earnings is really only relevant to a claim by the widow. It is not a matter which in the ordinary case affects another claimant. In the present case, if the widow, besides having received damages had been only partially dependent, the amount to which the infant would, on his argument, be entitled would fall to be reduced for no apparent reason.

These considerations might have considerable weight and might well tip the balance if the words which have to be interpreted had been obscure or ambiguous. But they are not. It is not, in my opinion, permissible to cut down words of this character by reference to so obscure and inconclusive a context. If the legislature had intended that the words should mean something so different from that which they clearly appear to mean, it seems to me impossible to suppose that it would have adopted such a method of expressing its intention. The anomalous results of *Avery's* case (1) and (if I am right) of the present case are, I think, largely attributable to a failure on the part of the legislature to appreciate that, unlike claims outside the Workmen's Compensation Act, which are based on the injury suffered by the claimant, the compensation payable under the Act in fatal cases is more analogous to insurance, subject to one qualification based on total or partial dependancy. These two different ideas are not properly dovetailed into one another. I agree with the careful judgment of the learned arbitrator and would dismiss the appeal.

MacKinnon L.J. I think the problem presented by this appeal is one of immense difficulty. The difficulty arises from the terms of the Act, and from the decision of the House of Lords in *Avery* v. *London and North Eastern Ry. Co.* (1).

(1) [1938] A. C. 606.

If we are constrained to dismiss the appeal the most extraordinary results must follow. A man might leave a widow and ten dependants under fifteen years old. That is a rare event now, but was common when I was a child. The widow could bring an action under Lord Campbell's Act on behalf of herself and of all the children except the eldest, a boy of fourteen and a half whose dependancy would be of very short duration. She would recover a large sum (say x*l*.), and if she had included the eldest boy in her claim she would have got very little more (say y*l*.). The eldest boy could then make his claim under the Workmen's Compensation Act, and asserting that the deceased left a widow and ten children under fifteen he could recover and keep for himself the maximum of 600*l*., though his actual loss by his father's death is a very small sum. The employer will then have been made to pay all but a few pounds (i.e., y*l*., the small extra sum which the widow would have got if she had included the eldest boy in her claim) short of his total possible liabilities under both Acts. The result is said to follow under this Act which by s. 29, sub-s. 1, has expressly provided that the employer " shall not be liable to pay com-"pensation . . . both independently of and also under this "Act." Whereas in the case I have suggested he will have to pay the maximum compensation under the Workmen's Compensation Act, and very little less than the maximum compensation under Lord Campbell's Act.

Obviously, if this is right, it will become the invariable practice, where there is a possible claim under both Acts, for all but one of the dependants (that one being the least seriously dependant) to claim under Lord Campbell's Act, and subsequently, or concurrently, for that one dependant to claim the maximum compensation allowed by the Workmen's Compensation Act. I cannot help thinking that the legislature thought of the dependants as a class, all of whom would assert their claims in the same way and in the same proceedings. Thus in s. 8, sub-s. 1, there is a mention of an " additional " sum, i.e., additional to the widow's claim, which seems to contemplate that she is making the claim on behalf of herself and *all* the dependants. In consonance with this No. 4 of the Rules under the Act clearly contemplates an application on behalf of *all* the dependants, and by para. 2 provides that if any of them refuse to join they may be added as respondents. But, whatever the intention of the legislature, it is now authoritatively decided by *Amery* v. *London and North Eastern*

Ry. Co. (1) that the language used in the Act does permit some of the dependants to claim under one Act, and others, or another, under the other Act. That case leaves the present problem undecided.

Again I should, without assistance, have thought that by the provision in s. 29, sub-s. 1, which I have quoted, the legislature intended not merely that the employer should not be sued by the *same* claimant or claimants under both Acts, but that he should not be liable to pay over again under the Workmen's Compensation Act any sum or compensation which he had already had to pay, or was liable to pay, under the other Act. If this were so in the case I suggested above the eldest son claiming under the Workmen's Compensation Act would only recover the small sum of *yl.*, i.e., that which the widow had abstained from recovering on his account under Lord Campbell's Act. This I should, without assistance, think, carried out the intention of s. 29, sub-s. 1, but *Avery* v. *London and North Eastern Ry. Co.* (1) shows that the eldest son could recover the maximum 300*l.* under the Workmen's Compensation Act, notwithstanding that his mother had recovered the large sum *xl.* under the other Act.

The question remains whether the eldest son, in my hypothetical case, can recover no less than 600*l.* for himself on the ground that his father left a widow and ten dependent children though the widow has already recovered the large sum *xl.* in respect of the dependancy of herself and the nine younger children? I feel quite certain that the legislature did not intend this result. I doubt if they intended that he could recover 300*l.*, though *Avery* v. *London and North Eastern Ry. Co* (1) decides that the language it used does permit this result. But I cannot decide this or any case merely relying on the intention of the legislature. The question is what is the effect of the words the legislature has used as authoritatively interpreted for us by the House of Lords in *Avery* v. *London and North Eastern Ry. Co.* (1), and on that question I am reluctantly constrained to agree with the reasoning of the Master of the Rolls, and to concur in his conclusion that this appeal must be dismissed.

GODDARD L.J. When the House of Lords decided *Avery* v. *London and North Eastern Ry. Co.* (1), their Lordships foresaw that the decision might, and probably would, produce anomalies,

(1) [1938] A. C. 606.

more particularly with regard to s. 8. Lord Atkin indeed envisaged the very question that arises in the present appeal, and in a cautiously worded passage expressed the opinion that when the section spoke of a widow or other member of the workman's family dependent on him, it meant a widow or other member of the family who was claiming under the Act. In the present case Judge Lawson Campbell, in his carefully reasoned judgment, has not felt able to follow this dictum, which, of course, did not bind him, and giving the words of the section their natural and ordinary meaning has come to the conclusion that as the infant's mother was dependent on the deceased, though she is not a claimant, he is entitled to recover the children's allowance in addition to the ordinary compensation. That the canon of literal construction is the primary rule to adopt none will deny. The only exception to that rule, it is said, is that it should not be applied where it would lead to absurdity, but an anomaly is not necessarily an absurdity. If, then, this is the rule to apply, in my opinion, the decision of the learned judge is unassailable, but the result is certainly startling. Had the boy's mother predeceased her husband, so that on the latter's death he would have been bereft of both parents, he could not have claimed the additional sum. As it is, if this construction is right, though he has a parent living who is bound to maintain him he can recover the children's allowance. This is certainly an anomaly, and some might think an absurdity and a result which the legislature could not have intended. So I ask myself if there is any other canon which can be applied, which, without doing violence to the language used, will produce a result more in harmony with what it may be presumed was the intention of Parliament.

The section first appeared in the Act of 1923, which was an amending Act. When one is construing remedial or amending legislation regard must be had to the state of affairs the Act was intended to remedy as well as to the remedy provided. The object of the amendment is fairly obvious. Compendiously, though not exhaustively, stated, it is that a widow with children should receive more generous compensation than one who is childless. At first it seemed to me that the key might be found in the words " an additional sum." Asking oneself the question " additional to what," the answer would be "additional to that awarded to a widow or other member of "the family not being a child under the age of fifteen," and some support for this is to be found in sub-s. 3, which lays down how the children's allowance is to be calculated. Why, it may be asked, should it be necessary to mention the widow or other member of the family if the allowance can be claimed by the children irrespective of either of these dependants? But it seems to me that this construction could create a position every bit as anomalous as that which results from the other. A and B, fellow workmen, are killed in the same accident, each leaving a widow and children. The widows claim damages, the children elect for compensation. The children of A are all under fifteen. On this construction they would get a maximum of 300*l.* and no children's allowance. B leaves one child over fifteen and the rest under that age. The child over fifteen claims for himself and his brothers and sisters, and they will get compensation plus the children's allowance up to a maximum of 600*l.* If, then, one finds that this, which is certainly a more artificial construction, can produce an anomaly not less striking than that resulting from the literal construction of the section, it appears to me that the only safe course is to adhere to the latter, as did the learned judge, leaving it to Parliament, if it sees fit, to amend the position caused by *Avery* v. *London and North Eastern Ry. Co.* (1), which one may assume was not foreseen when the section that we are now considering was drafted. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for company: *Barlow, Lyde & Gilbert.*

Solicitors for infant: *Chamberlain & Co., for Mellows & Sons, Peterborough.*

(1) [1938] A. C. 606.

P. J. B.

1942
June 11.

REX *v.* WOKING JUSTICES.

Ex parte JOHNSTONE.

Justices—Sentence—Fine—Time allowed for payment—Default—Inquiry as to means—Order of imprisonment in default of payment—Validity—Criminal Justice Administration Act, 1914 (4 & 5 *Geo.* 5, *c.* 58), *s.* 1*—Money Payments (Justices Procedure) Act,* 1935 (25 & 26 *Geo.* 5, *c.* 46), *s.* 1, *sub-ss.* 1, 3.

The applicant, who was convicted by justices of offences under the Defence (General) Regulations, and fined, was allowed time in which to make payment. He defaulted, and filed a petition in

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bankruptcy. An inquiry was held by the justices under s. 11 of the Money Payments (Justices Procedure) Act, 1935, into the ability of the applicant to make payment. The only evidence adduced at the inquiry was that of the applicant, and was to the effect that he was entirely without means. The justices, however, made an order committing the applicant to prison for three months in default of payment of the fines within a specified period :—

Held, that the justices holding the inquiry were not empowered to ignore the only possible conclusion to be drawn from the evidence adduced thereat, namely, that the applicant was not possessed of sufficient means to pay the fines, and that, in those circumstances, they could not commit the applicant to prison.

MOTION for order of certiorari.

On December 17, 1941, Prices (Wholesale) Chemists, Ld., were convicted at Woking petty sessions of selling goods in excess of the quota permitted under the Limitations of Supplies (Miscellaneous) (No. 5) Order, 1940 (St. R. & O., No. 2031), made pursuant to the Defence (General) Regulations, 1939, and were fined 100*l.* on each of ten summonses. The applicant was also summoned as a director of the company and he was fined 150*l.* on each of ten summonses and was ordered to pay 15 guineas costs. The applicant was allowed twenty-eight days in which to pay, no order being made by the justices as to imprisonment in default of payment. On January 28, 1942, 750*l.*, being half the amount of the fines imposed on the applicant, was paid on his behalf by Woodlands Chemists, Ld., by whom he was then employed as managing director. On March 12, 1942, Woodlands Chemists, Ld., were summoned at Guildhall, London, for similar offences, occurring at the same time as those of Prices (Wholesale) Chemists, Ld., and were fined 10,000*l.* and ordered to pay 15 guineas costs. As a director of the company, the applicant was fined 10,000*l.* and ordered to pay 15 guineas costs. The company and the applicant were given until June 12 for payment, no imprisonment being ordered in the event of default. On March 23, 1942, the applicant filed his petition in bankruptcy, and a receiving order and adjudication were made on the same day. His statement of affairs showed assets of 85*l.* and liabilities, including the fines and costs, of 11,531*l.* 10*s.* On May 2, 1942, the applicant, having failed to pay the balance of the penalties imposed by the Woking justices, attended an inquiry under s. 11 of the Money Payments (Justices Procedure) Act, 1935, by those justices as to his means and gave evidence

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that he had no means whatever, that he had lost his employment, and that, as an undischarged bankrupt, he was unable to practice as a pharmaceutical chemist. There was no other evidence before the court. The justices made an order that the applicant should pay the balance of 750*l.* within twenty-eight days, or in default of payment be committed to prison for three months. The applicant now moved for an order of certiorari to remove the order of the justices for the purpose of its being quashed.

Armstrong Cowan for the applicant. Sect. 1, sub-s. 3, of the Money Payments (Justices Procedure) Act, 1935, must be read together with s. 1 of the Criminal Justice Administration Act, 1941 (1), the result being that where a defendant is allowed time for payment of a fine a warrant for his commitment to prison in respect of non-payment of that fine must not be issued unless, after his conviction, the competent court has made inquiry as to his means, as prescribed by s. 1, sub-s. 3, of the Act of 1935, and is satisfied that he is possessed of sufficient means to enable him to pay the fine forthwith. In the present case the only evidence adduced before the justices who made the inquiry was that the applicant had no means and the justices could not arrive at any conclusion other than that. The applicant, therefore, cannot be committed to prison in the event of non-payment of the fines imposed on him.

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(1) By Criminal Justice Administration Act, 1914, s. 1: "A warrant committing a person to prison in respect of non-payment of a sum adjudged to be paid by a conviction of a court of summary jurisdiction shall not be issued forthwith unless the court which passed the sentence is satisfied that he is possessed of sufficient means to enable him to pay the sum forthwith . . . ."

Money Payments (Justices Procedure) Act, 1935, s. 1, sub-s. 1: "Where a court of summary jurisdiction adjudges a person to pay a sum by a conviction and allows time for payment, the court shall not on that occasion impose on the defendant a period of imprisonment in default of payment of that sum: Provided that this subsection shall not have effect where the court on that occasion and in the presence of the defendant determines that for special reason, whether having regard to the gravity of the offence, to the character of the defendant or to other special circumstances, it is expedient that he should be imprisoned without further inquiry in default of payment."

Sub-s. 3: "A warrant of commitment to prison in respect of the non-payment of a sum adjudged to be paid by a conviction of a court of summary jurisdiction shall not be issued in the case of a defendant who has been allowed time for payment, unless on an occasion subsequent to his conviction the competent court has made inquiry as to his means in his presence."

Harold B. Williams for the justices. Sect. 1, sub-s. 3, of the Act of 1935 specifically states that the inquiry as to the means of a defendant is to be in his presence and on an occasion subsequent to his conviction, but otherwise it contains no word of restriction on the power of justices to commit. The absence of a restriction is the more significant because the Act imposes such restrictions in regard to certain classes of payment, e.g., affiliation orders (s. 8, sub-s. 1) and rates (s. 10). The effect of the Criminal Justice Administration Act, 1914, is to forbid the issue of a warrant of commitment forthwith unless the court is satisfied of the defendant's ability to pay forthwith, and has nothing to do with a case where the defendant is given time to pay. In the latter case it is not essential that the defendant shall be shown to possess means sufficient to enable him to pay the fine before the justices, acting advisedly, can order imprisonment. In the present case, if the justices, in view of the gravity of the offence, had in the first instance under s. 1, sub-s. 1, of the Act of 1935 imposed imprisonment in default of payment, no question of means would have arisen.

Viscount Caldecote C.J. The justices claim to be entitled to make the order which they made here in pursuance of the power which, it is said, they have in the case of a grave offence to send an offender to prison. That, however, would seem to be assuming a power to do something which the court which convicted the applicant alone had power to do, for I can find nothing in this legislation to satisfy me that the justices who were inquiring into the means of the applicant were endowed with power to pass a sentence in respect of the offence of which he had been convicted on an earlier occasion. That view, I think, obtains support from the fact that the matter is specifically dealt with in the proviso to sub-s. 1 of s. 1 of the Act of 1935, which provides that in cases of gravity, or where there are other special circumstances existing, the convicting justices may order the defendant to be imprisoned in default of payment without further inquiry, but it is not, and could not be, suggested, that the justices who made the order of which the present applicant complains were acting under that provision, because they were not the justices who convicted

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the applicant of the offence charged against him, but were justices who were making inquiry into his means on an occasion subsequent to his conviction, under s. 1, sub-s. 3.

With regard to that sub-section, it is argued on behalf of the justices that, while they must make an inquiry as to the means of the defendant in the manner prescribed by the sub-section, if they think that it is a grave case they may commit him to prison, even though they ascertain, as the result of the inquiry, that he has no means. That, however, seems to me to be quite contrary to the intention of the Act. We have been referred to provisions in the Act, such as those of s. 8, which provide that in connection with an order for payment of a weekly sum in bastardy proceedings "the justices shall "make inquiry, in the defendant's presence, as to whether his "failure to pay that sum was due either to his wilful refusal "or to his culpable neglect," and must be of opinion that his failure to pay that sum was due either to his wilful refusal or his culpable neglect before they can commit him to prison. That section is contrasted with s. 1, sub-s. 3, where nothing is said about the justices being satisfied about anything before committing a defendant to prison, but merely that they are to make inquiry as to the means of the defendant in his presence. I cannot bring myself to believe that the legislature, in enacting that sub-section, intended anything so futile as to order an inquiry and to devise for it the machinery contained in s. 11, although at the same time the justices might turn a blind eye to the results of the inquiry. The intention of the Act plainly was to amend the existing law in the direction which the habits of thought of these times increasingly have demanded, namely, not to send persons to prison for mere failure to pay debts. I think the intention of s. 1, sub-s. 3, was to prevent a person being committed to prison in the circumstances stated in the sub-section, if the justices found that he had no means to enable him to pay. I think that this application should succeed.

HUMPHREYS J. I agree.

TUCKER J. I agree.

Solicitors for applicant: *Golding, Hargrove & Golding.*

Solicitors for justices: *Joynson-Hicks & Co., for W. Davies, Woking.*

A. W. G.

BLUNT *v.* PARK LANE HOTEL, LIMITED, AND ANOTHER.

C. A.

1942
June 8, 9,
18.

Practice—Discovery—Interrogatories—Slander—Interrogatories directed to establishing adultery—Admissibility.

Interrogatories directed to establishing, in justification of words complained of as a slander, that a married woman has been guilty of unchaste conduct are admissible.

It is only in proceedings for divorce on the ground of adultery that the spouse will be protected from answering interrogatories if the answers might tend to prove the adultery, and the decision in *Redfern* v. *Redfern* [1891] P. 139 is restricted to such cases. Although Bowen L.J. said in that case (at pp. 147, 149) that discovery would not be permitted in any division of the courts in regard to a matter involving ecclesiastical punishment and censure, that can no longer be treated as correct, as the jurisdiction of the ecclesiastical courts (except possibly as regards clerical persons and a few special matters) must now be treated as obsolete.

APPEAL from Hallett J.

On September 24, 1941, the plaintiff, a married woman, brought proceedings against Park Lane Hotel, Ld., and one Briscoe for damages for slander. By her statement of claim she alleged that on April 19, 1941, at the Park Lane Hotel the defendant, Briscoe, acting as manager of the hotel, falsely and maliciously spoke and published to two persons concerning her these words: "If you knew this woman as we do you "would not have anything to do with her." The plaintiff alleged that by these words the defendant meant and was understood to mean that she was a loose woman and was unchaste and adulterous and not fit for decent society. By his defence, the defendant, Briscoe, alleged (inter alia) that the words complained of were true in substance and in fact, and, in support of that plea, alleged by way of particulars a number of occurrences which, if proved, would show that the plaintiff had been guilty of unchastity with numerous men. On April 9, 1942, the defendant, Briscoe, applied for leave to administer to the plaintiff interrogatories which substantially went to the matters in the particulars, all the interrogatories except one being directed to establishing that on a number of occasions the plaintiff had been guilty of unchaste conduct with different men at the Park Lane Hotel and elsewhere. Master Horridge gave the defendant leave to administer the material interrogatories. Hallett J. dismissed

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an appeal from the master's decision, but gave the plaintiff leave to appeal. The plaintiff appealed.

Beyfus K.C. and *Dare* (with them *Beney*) for the plaintiff. It is sought to interrogate the plaintiff to obtain admissions of adultery with sundry persons and that is contrary to the unbroken rule that no form of discovery will be allowed to establish adultery: *Redfern* v. *Redfern* (1). That was a petition for dissolution of marriage, and Bowen L.J. laid it down authoritatively that in no division of the courts will discovery be permitted in regard to a matter involving forfeiture, penalties or ecclesiastical punishment or censure (2). Historically the courts have treated proceedings for divorce on the ground of adultery as criminal or quasi-criminal proceedings and the observations of Bowen L.J. were really an application of the doctrine that no one is bound to incriminate himself. *Redfern* v. *Redfern* (1) was distinguished in *Elliott* v. *Albert* (3) on the ground that the issue there was whether there had been enticement and the interrogatories were not addressed to the issue of adultery though they might suggest it. The dicta of Maugham L.J. in the latter case that the possibility of ecclesiastical censure in such a case as the present was "fanciful" were erroneous (4). [Goddard L.J. The object of the interrogatories here is not to prove adultery, but that the plaintiff is a loose woman.] She being a married woman, that must involve the issue of adultery, but the same principle applies to cases of fornication: *Chetwynd* v. *Lindon* (5) and *Finch* v. *Finch* (6). The resulting liability to ecclesiastical censure is made clear in Cripps on Church and Clergy, 8th ed., p. 527, where it is stated that the incumbent of a parish may repel any person who is an open and notorious evil liver from taking part in a celebration of the Holy Communion. If the defence here were made out it would be established that the plaintiff is an open and notorious evil liver. [They referred also to *Campbell* v. *Campbell* (7) and *Cavendish* v. *Cavendish* (8).]

Valentine Holmes for the defendant, Briscoe. *Redfern* v. *Redfern* (1) has no application except in the Divorce Court. The dictum of Bowen L.J. relied on shows that he is putting ecclesiastical punishment or censure on the same footing as penalties or forfeiture, but the generally recognized principle is that answers to interrogatories will be allowed where there is no real danger of criminal punishment flowing from them: *Reg.* v. *Boyes* (1). There is no appreciable risk of the plaintiff being brought before the ecclesiastical court for punishment or censure if she admits adultery, and the court should not, therefore, refuse to allow the interrogatories. Moreover, all that this defendant is concerned to show is that the plaintiff is an unchaste woman and that does not involve a charge of adultery. *Elliott* v. *Albert* (2), therefore, applies. The only authority relied on is *Redfern* v. *Redfern* (3), apart from cases going back to when the ecclesiastical courts punished sin so that the same principle was applied to what was a sin in ecclesiastical law or to what was criminal in the ordinary law. It would be contrary to common sense to refuse to allow the interrogatories in the present conditions.

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(1) [1891] P. 139.
(2) Ibid. 147, 149.
(3) [1934] 1 K. B. 650.
(4) Ibid. 666.
(5) (1752) 2 Ves. Sen. 450.
(6) (1752) 2 Ves. Sen. 491, 493.
(7) [1940] P. 90.
(8) [1926] P. 10.

Beyfus K.C. replied.

Cur. adv. vult.

1942. June 18. Their Lordships read the following judgments.

LORD CLAUSON. The defendant, Briscoe, might urge in answer to the plaintiff's claim to protection from being called on to answer the interrogatories, that such a claim may be and ought to be taken on oath in the answer and that it is premature to take the objection at this stage. This point has not been pressed, and the arguments have conveniently proceeded on the footing that the real question for decision is whether the plaintiff is right in urging that, according to the practice of the court, she is entitled to be protected from being forced to answer.

It is urged, in the first place, on the plaintiff's behalf, that her answer might tend to prove her adultery, and that it was decided in *Redfern* v. *Redfern* (3) that that circumstance protects her from being forced to answer. I am, however, satisfied that, as already stated by Lord Esher M.R. in this court in *Spokes* v. *Grosvenor Hotel Co.* (4), the decision in *Redfern* v. *Redfern* (3) proceeded "on the particular provisions "of the Divorce Acts." The decision, recognizing that a spouse charged with adultery and electing to give evidence in

(1) (1861) 1 B. & S. 311.
(2) [1934] 1 K. B. 650.
(3) [1891] P. 139.
(4) [1897] 2 Q. B. 124, 132.

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proceedings instituted in consequence of adultery, could not be forced to answer about his or her adultery, laid down the practice that no discovery relating to the issue of adultery should be ordered in such proceedings. The decision, however, deals only with proceedings instituted in consequence of adultery, i.e., as explained by Barnes J. in *Evans* v. *Evans* (1) (following a dictum of Grove J. in *Guardians of Nottingham Union* v. *Tomkinson* (2)), proceedings instituted to produce the result of divorce as a consequence of adultery. The correctness of the decision in *Evans* v. *Evans* (1) is recognized in this court in *Elliott* v. *Albert* (3).

Failing to satisfy us that his first contention could be supported, counsel for the plaintiff next based his claim for his client's protection on the wider ground that if she was called on to answer the suggested interrogatories her answer might expose her to punishment in the ecclesiastical courts for adultery or for unchastity. The point might well have been good in the eighteenth century when such punishment was still in fact meted out in those courts. The historical position as to this is usefully stated by Bowen L.J. in *Redfern* v. *Redfern* (4), but I feel no doubt that (save possibly as regards the case of a spiritual person) this jurisdiction of the ecclesiastical courts has fallen into abeyance and must now be treated as obsolete. I asked in vain for an instance within the last 150 years in which this jurisdiction had been exercised. Maugham L.J. in *Elliott* v. *Albert* (5) came to the conclusion, in accord with the view expressed by Barnes J. in *Evans* v. *Evans* (1), that the suggestion, which he characterizes as "fanciful," of the possibility of ecclesiastical censure cannot, in these days, be treated as sufficient to protect a party from answering an interrogatory. I agree, and I am satisfied that the plaintiff's claim to protection on this wider ground must fail.

Counsel finally put forward as a basis for his claim for his client's protection the ground that she might by her answer brand herself as an evil liver and thus incur the risk of being refused the sacraments by her parish minister acting in accordance with church law. I may venture to borrow the language of Maugham L.J. and characterize this suggestion, too, as fanciful. If, however, any authority is required for the proposition that the mere fact that the answer might prejudice

(1) [1904] P. 378.
(2) (1879) 4 C. P. D. 343, 349.
(3) [1934] 1 K. B. 650.
(4) [1891] P. 139.
(5) [1934] 1 K. B. 650, 666.

the good fame of the party answering without tending to make him amenable to penalties imposed by a lawful court is no ground of protection to him, it will be found in Storey on Equity Pleading (1838 ed.), s. 596. See also Bray on Discovery, p. 341. In my judgment, the appeal must fail and must be dismissed with costs.

GODDARD L.J. The plaintiff objects to interrogatories sought to be administered in support of the second defendant's plea of justification on the ground that the object is to show that she has been guilty of adultery. Her objection is based on two grounds: First, it is said that the interrogatories are inadmissible because an affirmative answer would expose her to the risk of ecclesiastical penalties, and, secondly, that *Redfern* v. *Redfern* (1) has decided that this objection applies to interrogatories of this description in all actions in all divisions of the court. Hallett J. has allowed the interrogatories. In my opinion, he was clearly right, and, moreover, as will appear from this judgment, the plaintiff cannot object to answer them.

Dealing first with the general objection, which applies both to oral evidence and to interrogatories, the rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for. This rule was laid down by the Queen's Bench in *Reg.* v. *Boyes* (2), and the words in which I have stated it are those of Stephen J. in *Lamb* v. *Munster* (3). A party can also claim privilege against discovery of documents on the like ground: see *Hunnings* v. *Williamson* (4). Is there, then, except in a case of a clerk in holy orders, any reasonable likelihood that such interrogatories would expose a person to ecclesiastical penalties? It is purely fantastic to suppose anything of the sort. When Lord Hardwicke decided *Finch* v. *Finch* (5) and *Chetwynd* v. *Lindon* (6), there was, no doubt, a real risk of such proceedings. In those days the courts of the Church exercised a very active jurisdiction over the laity in criminal causes. Heresy, simony, defamation, brawling in church or churchyard, and all forms of immorality and not merely

(1) [1891] P. 139.
(2) 1 B. & S. 311.
(3) (1882) 10 Q. B. D. 110.
(4) (1883) 10 Q. B. D. 459.
(5) 2 Ves. Sen. 493.
(6) 2 Ves. Sen. 450.

adultery were within their cognizance, pro reformatione morum et pro salute animæ. They derived this jurisdiction from the statute 13 Edward 1, commonly called Circumspecte agatis, and their decrees were enforced by the Chancery which issued the writs of De contumace capiendo in aid of the penalties imposed and of sequestration for the recovery of costs or other sums of money which they ordered to be paid. Such jurisdiction has long been obsolete, so far as the laity are concerned, when it has not been expressly taken away by legislation. In 1855 these courts were deprived of cognizance of cases of defamation (18 & 19 Vic. c. 41) and in 1860 of brawling (23 & 24 Vic. c. 32). That they were not then expressly deprived of cognizance of cases of immorality or the other matters I have mentioned is probably due to the fact that it was generally recognized that such jurisdiction was obsolete. In 1876 *Phillimore* v. *Machon* (1) came before the Court of Arches. In rejecting the suit Lord Penzance, Dean of the Arches, said: "It cannot, I think, be doubted that a recurrence "to the punishment of the laity for the good of their souls by "ecclesiastical courts, would not be in harmony with modern "ideas, or the position which ecclesiastical authority now "occupies in the country. Nor do I think that the enforce- "ment of such powers where they still exist, if they do exist, "is likely to benefit the community." This reflects in modern language the wisdom of Lord Bacon, expressed more than 200 years earlier in his Essay on Judicature: "Penal laws if "they have been sleepers of long time or if they be grown "unfit for present use should be by wise judges confined in the "execution." After this emphatic pronouncement by Lord Penzance it is impossible to believe that any diocesan chancellor would allow his office to be promoted for the punishment of immorality in a layman. It is important to notice that the promoter in a criminal ecclesiastical suit cannot commence proceedings as of right. He has to petition the judge to allow his office to be promoted, and it is only if the judge considers that it may be a proper case that he allows the proceedings to be started, which he does by ordering a motion for a citation to be made in open court when the defendant may appear and object to it. If the judge then decides that it is a proper case for his office to be used he directs a citation to issue. In *Maidman* v. *Malpas* (2), it was laid down by Sir William Scott, afterwards Lord Stowell, that the leave of the court

(1) (1876) 1 P. D. 481, 487.

(2) (1794) 1 Hagg. Cons. 205.

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must be first obtained. The jurisdiction was not to be exercised without discretion or to be left entirely to the judgment or passions of private persons. Spiritual courts still have and ought to have full and unfettered disciplinary jurisdiction over clerical persons, but as regards the laity, except in the case of unauthorized acts in connection with the fabric or ground of a church or churchyard, e.g., *Daunt* v. *Crocker* (1), and offences by churchwardens in respect of their office, *Lee* v. *Hawtrey* (2), their jurisdiction is obsolete and gone beyond recall. The first objection, therefore, fails.

It is said, however, that this court decided in *Redfern* v. *Redfern* (3) that in no circumstances will discovery either by way of interrogatories or disclosure of documents be ordered where the object is to establish adultery. In my opinion, this is not the effect of the decision. It was a divorce case and had it been a question of interrogatories the short and sufficient answer would have been that s. 3 of the Evidence Further Amendment Act, 1869, forbids any question being put to a party in a divorce suit tending to show that he or she has committed adultery unless the witness has already denied the fact in evidence. It was an application for discovery of documents, and the court showed that, while the ecclesiastical court had always exercised the power of ordering discovery, it had never compelled a party to disclose on oath documents which tended to prove his or her own adultery. This would be natural in a court in which originally adultery could be dealt with criminally, but, apart from that, it follows the maxim that no one is bound to criminate himself, and, adultery being a charge of a grave character, the maxim was applied to it. That case was afterwards declared by this court to be no authority on the general law of discovery, *Spokes* v. *Grosvenor Hotel Co.* (4), and was also so regarded by this court in *Elliott* v. *Albert* (5). This was clearly the opinion of Maugham L.J., nor do I think Scrutton L.J. in any way differed from him. *Redfern* v. *Redfern* (3) settled the practice as to discovery in cases in the Divorce Division where the object of the suit is to lead to a decree of dissolution on the ground of adultery, and that is all that it did. In view of *Elliott* v. *Albert* (5) it would have been quite enough to say in this case that the object of the interrogatories here is not to establish

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(1) (1867) L. R. 2 A. & E. 41.
(2) [1898] P. 63.
(3) [1891] P. 139.
(4) [1897] 2 Q. B. 124.
(5) [1934] 1 K. B. 650.

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adultery but merely unchastity, but I desire to make it quite clear that, if the slander alleged had been "she has committed "adultery," the result would have been exactly the same. If any new practice was settled by *Redfern* v. *Redfern* (1) it was only that in divorce proceedings discovery tending to establish adultery is not to be allowed at all instead of it being left to the party to take the objection on oath to answering the interrogatory or to disclosing the document. If this decision be not confined to divorce cases, where adultery is, so to speak, the cause of action, it would seem to follow that it would apply to discovery relating to any form of unchastity, immorality or notorious evil living which might come in issue in some other class of action, as all of these matters were formerly within the criminal cognizance of the spiritual courts. But nowhere has it ever been suggested that there is any such limitation on the right to discovery.

Though it is not really material I will deal very briefly with another of the arguments put forward by Mr. Beyfus. He pointed out that discovery was refused in actions for penalties and forfeiture, though he said that, if the defendant went into the box, he would have to answer the questions. Actions for penalties are penal actions. The plaintiff, like a prosecutor, must prove his case and cannot extract admissions from the defendant any more than from a prisoner charged on indictment. Forfeiture has always been regarded, both at law and in equity, as in the nature of a penal action. Indeed, all actions of ejectment were so regarded as having the object of depriving a man of his estate. Discovery was an equitable proceeding and a court of equity regarded itself as a court to relieve against forfeiture and not to assist it. The law on the subject is fully explained in *Pye* v. *Butterfield* (2) and needs no further exposition here.

One other argument that was adduced was that an admission of adultery might result in the refusal of the sacrament to the offender. There is a complete air of unreality about such an argument in a case of this sort, and I will only say that, assuming that acts of adultery (of which the offender may have repented) as distinct from living in adultery would furnish "lawful cause" within the statute 1 Edward 6, c. 1, for a minister's refusal to administer the sacrament, that is not a penalty within the rule to which I referred at the beginning of this judgment.

(1) [1891] P. 139.

(2) (1864) 5 B. & S. 829.

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I have dealt with this matter at some length, greater perhaps than the subject deserves, partly in deference to the vigorous argument presented to us by Mr. Beyfus, but mainly because it is desirable that this objection, which has been taken before and might be taken again, should be disposed of finally.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker; Lewis & Lewis and Gisborne & Co.*

H. C. G.

REX *v.* GENERAL MEDICAL COUNCIL.

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Mar. 27.

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June 11, 18.

Medical practitioner—General Medical Council—Removal of name from register—Jurisdiction—Doctor co-respondent in divorce petition—Finding of adultery against him—Right of council to accept findings of Divorce Court—Rehearing of issue of adultery—Holding of "due inquiry"—Medical Act, 1858 (21 *&* 22 *Vict. c.* 90), *s.* 29.

A registered medical practitioner, who was co-respondent in a divorce petition, was found by the Divorce Court to have committed adultery with the respondent to whom he stood in professional relationship, and a decree nisi was pronounced which was afterwards made absolute. The General Medical Council gave the medical practitioner notice that a meeting of the council would be held to decide whether his name should be removed from the medical register for infamous conduct in a professional respect. At the hearing the medical practitioner desired to call on the issue of adultery evidence which had not been called on the hearing of the petition although it was then available. The council declined to hear the fresh evidence, but accepted the decree nisi as prima facie proof of adultery, and directed that the medical practitioner's name should be erased from the register:—

Held, by the Court of Appeal (MacKinnon L.J., Lord Clauson and Goddard L.J.) that, while the General Medical Council was entitled to regard the decree in the divorce suit as prima facie evidence of adultery, it was bound to hear any evidence tendered by the practitioner, and that, having refused to hear such evidence in the present case, it had not made "due inquiry" under s. 29, of the Medical Act, 1858.

Decision of the Divisional Court reversed.

APPLICATION for an order of certiorari to the General Medical Council to quash the direction given by the council to erase the name of the applicant, Dr. Eric Spackman, a medical practitioner, from the medical register.

On February 3, 1941, Langton J. adjudged the applicant to have committed adultery with a married woman, Barbara Pepper, and pronounced a decree nisi on the husband's petition. On August 26, 1941, the decree was made absolute. On October 2, 1941, a letter was written to the applicant on behalf of the council in the following terms: "On behalf of "the General Medical Council we give you notice that information and evidence have been received by the council from "which it appears: 1. You committed adultery with Barbara "Pepper, a married woman, of which adultery you were "found guilty by the decree of the Probate, Divorce and "Admiralty Division (Divorce) of the High Court of Justice "dated February 3, 1941, and made absolute on August 26, "1941, in the case of *Pepper* v. *Pepper* (*Spackman cited*) in "which you were in the respondent's answer to the petition "cited as co-respondent. 2. You stood in professional "relationship with the said Barbara Pepper at all material "times. And that in relation to the facts so alleged you have "been guilty of infamous conduct in a professional respect. "And we are directed further to give you notice that on "Wednesday, November 26, 1941, a meeting of the General "Medical Council will be held at 66, Portland Place, London, "W.1, at 11.30 a.m., to consider the above-mentioned charge "against you and decide whether or not they should direct "your name to be removed from the medical register, pursuant "to s. 29 of the Medical Act, 1858 (1). You are requested "to answer in writing the above charge and to attend before "the General Medical Council at the above-named place and

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(1) By s. 29 of the Medical Act, 1858: " If any registered medical " practitioner shall be convicted in " England or Ireland of any felony " or misdemeanor, or in Scotland " of any crime or offence, or shall " after due inquiry be judged by " the General Council to have " been guilty of infamous conduct " in any professional respect, the " General Council may, if they see " fit, direct the registrar to erase " the name of such medical " practitioner from the register." Chapter XIV. of the Standing Orders of the Council, including rules scheduled thereto, deals with the procedure for penal erasure from the medical register.

Rule 9 provides " Where there " is no complainant or no com" plainant appears, the following " will be the order of procedure: " (*a*) The solicitor, or counsel " representing the council, will " state the facts of the case and " produce the evidence in support " of so much of it as is not " admitted. (*b*) The practitioner " will then be called upon by the "time, to establish any denial or defence that you may have "to make to it." The council duly met to consider the case of the applicant. The solicitor to the council opened his statement of the facts of the case and referred to the decree pronounced by Langton J. as establishing the fact that the applicant had committed adultery as alleged in the charge. Thereupon the applicant's solicitor admitted professional relationship, but submitted that he should be allowed to call certain evidence which was not before the Divorce Court with a view to going behind the decree. He stated that the evidence which he desired to call was available at the hearing of the petition and could, with reasonable diligence, have been called. If he had then been advising the applicant, the witnesses would have been called in the divorce proceedings. The legal assessor informed the solicitor that it was the practice of the council to accept prima facie at least the decree nisi as evidence of adultery, and that the onus was on the applicant to show some special grounds why the council should not accept it as such. The council after deliberating in camera refused to hear fresh evidence on the question of adultery. The solicitor then addressed the council and called one witness. The council again deliberated in camera, and then announced its decision to direct the registrar to erase the applicant's name from the medical register.

Havers K.C. and *Dickens* for the applicant. Under s. 29 of the Medical Act, 1858, the General Medical Council is only empowered to direct the erasure from the medical register of the name of a medical practitioner for infamous conduct in any professional respect after having been found guilty by the council of such conduct after due inquiry. There is a difference according to the section between such a case and that of a medical practitioner who has been convicted of a felony or misdemeanour. In the case of a criminal offence the council need not hold an inquiry but can erase the name of such medical practitioner on proof of the conviction

"President to state his case, and "to produce the evidence in support of it. He may address "the council either before or at "the conclusion of his evidence, "but only once. (*c*) If the "practitioner has produced evidence the solicitor may be heard "in reply."

Rule 10: "Evidence may be "taken by the council by oral "statement or by written deposition or statement."

In the present case the council treated the decision of a Divorce Court on a charge of adultery as being the same as a conviction, and ordered the erasure of the applicant's name from the register without due inquiry. The meaning of "due "inquiry" was considered in *Leeson* v. *General Medical Council* (1), where Bowen L.J. said (2): "There must be an "allegation before the General Medical Council of infamous "conduct in some professional respect, and adjudication must "be arrived at after due inquiry. The statute says nothing "more, but in saying so much it certainly imports that the "substantial elements of natural justice must be found to "have been present at the inquiry. There must be due "inquiry. The accused person must have notice of what he "is accused. He must have an opportunity of being heard, "and the decision must be honestly arrived at after he has had "a full opportunity of being heard." The council has not in the present case complied with the requirements laid down by Bowen L.J. The witnesses whom the applicant wished to call were not allowed to give their evidence, and, therefore, the council did not hold a due inquiry. The council has adopted a practice, following that of the Court of Appeal, of refusing to hear fresh evidence unless special circumstances are shown, but the council is not a court of appeal, and a duty has been imposed on it, before adjudicating on the question whether a doctor has been guilty of professional misconduct, itself to hold an inquiry. Even if a decree absolute in the Divorce Court is a judgment in rem it does not affect the duty of the council to hold a due inquiry. [*Partington* v. *Partington* (3) was referred to.]

Beyfus K.C. and *Douglas Bartley* for the council. Where a judicial inquiry has been held and a medical practitioner has been found guilty of adultery on a petition for divorce the council can proceed to remove the name of the practitioner from the register. It would be strange if, while the council is bound to accept as binding the decision of magistrates or justices that a practitioner has been guilty of a misdemeanour, it could not accept as binding the finding of the Divorce Court that a practitioner has been guilty of adultery. There is nothing in the practice adopted by the council contrary to the principles of natural justice which were stated by Lord Shaw in *Local Government Board* v. *Arlidge* (4) where he said:

(1) (1889) 43 Ch. D. 366.
(2) Ibid. 383.
(3) [1925] P. 34.
(4) [1915] A. C. 120, 138.

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"When a central administrative board deals with an appeal "from a local authority it must do its best to act justly, "and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without "express guidance it must still act honestly and by honest "means . . . . The assumption that the methods of natural "justice are ex necessitate those of courts of justice is wholly "unfounded." In the present case the council has sought to arrive at just ends by just means. Scrutton L.J. in *Nash* v. *Rochford Rural Council* (1) quoted the principle which was stated by Lord Chelmsford in *Shedden* v. *Patrick* (2) in these words: "It is an invariable rule in all the courts, and one "founded upon the clearest principles of reason and justice, "that if evidence which either was in the possession of parties "at the time of a trial, or by proper diligence might have been "obtained, is either not produced, or has not been procured, "and the case is decided adversely to the side to which the "evidence was available, no opportunity for producing that "evidence ought to be given by the granting a new trial." "Due inquiry" cannot mean merely the hearing of fresh evidence, but logically must mean the rehearing of all the witnesses. A petitioner in a divorce petition may be very loth to give evidence at the inquiry before the council where he has not the same reason for giving evidence as he had in the Divorce Court, and, further, the council have no power to compel the attendance of witnesses. It would, therefore, be putting an undue burden on the council to compel it to rehear a divorce petition.

Havers K.C. replied.

Cur. adv. vult.

1942. March 31. The following judgments were read.

VISCOUNT CALDECOTE C.J. In deciding between the two views which have been presented to us I cannot find much guidance from the fact that the council bases its practice on what is said to be the practice of the Court of Appeal. It would not be proper for me, even if I had any desire which I have not, to criticize any practice or decision of the Court of Appeal. The council is not an appellate court, and it seems to me immaterial that the council has only done what the Court of Appeal would do in a case in which an appellant was

(1) [1917] 1 K. B. 384, 393.

(2) (1869) L. R. 1 H. L. Sc. 470, 545.

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asking for leave to call further evidence. It is better to consider the terms of s. 29, and to see whether the council has complied with its provisions, for everything turns upon this section.

Mr. Havers quite rightly called our attention to the distinction between the case of a conviction of felony or misdemeanour and a charge of infamous conduct in a professional respect. In the former case all that has to be proved is the fact of the conviction. In the latter case there must be " due inquiry " before a direction to erase the name of a medical practitioner from the register can be given. So much is plain, but the question still has to be answered: What is " due inquiry," or, to put the question more conveniently: Was due inquiry made in the case before us? That is the whole question.

The council is what is sometimes called a domestic tribunal. To it is entrusted the duty of safeguarding the good name of the medical profession to the extent of having power to take off from the register the names of medical practitioners in certain circumstances. I cannot believe that Parliament intended to compel the council in all cases under s. 29 to act as if it were a court of law trying a criminal charge. For one thing Parliament has clearly put no such duty on the council in what perhaps are the more serious cases that come before it, namely, convictions of felony or misdemeanour. For another thing, the council has not been equipped for any such task. It is unable either to compel the attendance of witnesses or to administer the oath to such witnesses as can be called. So far as I can see, it is not bound by the rules of evidence. If, then, the council is not constituted as or equipped with the powers of a court, I think it is reasonable and right to suppose that Parliament meant to leave the council to devise its own means of ascertaining the facts on which its decisions must depend. A charge of " infamous " conduct " might be made in such circumstances as to require the council to try for the first time the allegation contained in the charge. Then I should hope the council would do its best to weigh the evidence in order to arrive at a just decision, and it could not discharge this duty properly if it shut out evidence which in fairness ought to be heard. Such a case was *Leeson* v. *General Medical Council* (1).

A very different position is reached if the council finds that a more experienced, and, as it thinks, a better fitted tribunal than itself has, after a full and fair hearing, found the accused person guilty of the conduct alleged. If the council takes pains to ascertain these facts I do not know why that should not be held to be "due inquiry." Sect. 29 uses words which suggest to me something different from a formal full dress trial. It is said that "due inquiry" means at least that witnesses that are tendered must be heard by the council and reliance was placed on the standing order and the rules scheduled to it. The objection to such a course is obvious. If evidence on one side is heard, the evidence on the other side must be heard, but it may not be available as it was at the trial. What is to happen then? Mr. Havers' view, apparently, was that the council must do the best it can with the material before it, which might include notes of evidence previously given. This seems to me to be a very unsatisfactory procedure. The ends of justice are much more likely to be served, in my opinion, by the course followed by the council in the present case. It goes without saying that the council must act honestly and with no corrupt motive. To use Lord Shaw's words, "it must do its best to act justly, and to reach just "ends by just means." I see nothing that can be said to be contrary to justice, whether it is called natural justice or merely justice, if this body, largely composed of medical men charged to make due inquiry, honestly decides to rely on the findings of one of His Majesty's judges, especially when, as in this case, all the evidence was available at the trial. It does not offend anyone's sense of justice that Parliament has made the verdict of a jury on a charge of felony conclusive. Equally, I find nothing to shock my sense of justice, if I find that the council, being satisfied that a full investigation has already been made by a competent court of a particular question of fact, chooses to accept the decision of that court without a fresh hearing.

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(1) 43 Ch. D. 366.

Nothing I have said must be taken to suggest that the council should close its eyes to evidence which shows that a decision relied on was obtained by fraud. Fraud, when proved, reopens everything. What I have said is subject to that qualification, and to other exceptional cases, which it is better not to attempt to define. I think that the council cannot be said in this case to have neglected its duty under s. 29 of the Medical Act, 1858. I ought to add that I do not agree with Mr. Beyfus' submission that the decree in the divorce proceedings was a judgment in rem binding on the applicant as an estoppel. In the result I think this application should be refused.

HUMPHREYS J. The sole question raised in this case is whether the General Medical Council, which directed the registrar to remove the name of the applicant from the register, did so after "due inquiry" as required by s. 29 of the Medical Act, 1858. That the council held an honest and impartial inquiry is not disputed. At that inquiry the only question said to be in dispute was this: Had Dr. Spackman committed adultery with Barbara Pepper, a married woman? That question had been heard and determined in the Divorce Court by Langton J. after a hearing extending over at least seven days, at the close of which that learned judge found the adultery proved and pronounced a decree nisi against Barbara Pepper at the instance of her husband on the ground of her adultery with Dr. Spackman. At that hearing Dr. Spackman was represented by solicitors and counsel, and called such evidence as he desired. From that finding there was no appeal and in due course the decree was made absolute. We are now invited to hold that the inquiry before the General Medical Council was not a due inquiry on the ground that the council refused to hear fresh evidence called by Dr. Spackman to negative the finding of adultery although that evidence was admittedly available to Dr. Spackman and could have been called in the divorce proceedings.

It is to be observed that the Medical Act, 1858, which created the General Medical Council, did not attempt to dictate to that body how such an inquiry should be held. The General Medical Council is not a court of law, but a domestic forum left to manage its own affairs as it considers best in the interests of the profession. It is not bound by rules of evidence, it has no power to administer an oath or to compel the attendance of witnesses. It may receive and act on hearsay evidence. Its rules permit the reception of written depositions or statements as well as oral evidence. In short, the council is free to adopt its own procedure and to decide on its own methods of proof so long as it obeys the dictates of natural justice. In my opinion, therefore, this court has no duty and no right to dictate to the General Medical Council what witnesses it must hear unless the refusal to hear them constitutes a violation of the principles of natural justice.

The General Medical Council could, of course, have heard the evidence tendered if it desired, and I doubt not would have done so if it had thought that justice required such a course to be taken. We have it in evidence that it would have done so if any special circumstances could have been shown, but we are asked to say that the practitioner had an absolute right to insist on the whole question being reopened, and Mr. Havers agreed that logically his contention would cover the case of a practitioner who did not desire to call fresh evidence but who required the council to rehear the case in the hope of inducing it to differ from the finding of the judge or jury in the Divorce Court. I cannot think that the principles of natural justice require the General Medical Council to adopt a course which would, I believe, have been refused, in the circumstances, by any court of justice in the kingdom, appellate or otherwise. I agree that the application should be refused.

SINGLETON J. The charge or complaint against Dr. Spackman is contained in a letter from the solicitors to the General Medical Council dated October 2, 1941. It falls into two parts: (1.) An allegation of adultery "of which adultery "you were found guilty by the decree of the Probate, Divorce "and Admiralty Division (Divorce) dated February 3, 1941, "and made absolute on August 26, 1941, in the case of *Pepper v.* "*Pepper* (*Spackman cited*)"; (2.) An allegation that the applicant stood in professional relationship with Mrs. Pepper at all material times. And it was said that in relation to the facts so alleged the applicant had been guilty of infamous conduct in a professional respect. As the letter shows, it was an essential part of the charge that adultery should be proved. In most such cases there may be no dispute as to this. In the present case it was intimated to the council by the solicitor who appeared for the applicant that he disputed the allegation of adultery and desired to call witnesses who had not been called when the petition was heard before Langton J. in the Divorce Division. The transcript shows quite clearly that the General Medical Council refused to hear fresh evidence on the question of adultery. They based their decision on this point on their general practice not to hear in a case of this nature any witnesses who were available at the hearing of the petition but who were not called. It appears that they have a practice which is similar to the rule laid down by the Court of Appeal and quoted in the Annual Practice, in notes to O. LVIII., r. 4, as to the allowing of new evidence. As to this it is to be remembered that the General Medical Council is not an appellate tribunal and further that the parties to the dispute were not the same.

Under s. 29 of the Medical Act, 1858, the council may direct the registrar to erase from the register the name of a practitioner who has been convicted of felony or misdemeanour. The council may also direct erasure from the register of the name of a practitioner who "shall, after due inquiry, be "judged by the General Council to have been guilty of infamous "conduct in any professional respect." In the first case they can act on proof of the conviction. In the other cases they cannot act until after due inquiry, which means until after due inquiry by them. It is obviously undesirable that there should be a second hearing on the issue of adultery after the question has been fully investigated by a judge of the Divorce Division, and there may be good reason for the amendment in that respect of s. 29 of the Act of 1858, but, as the section stands, there must be due inquiry whether infamous conduct in any professional respect is proved, and in the circumstances of the present case the first stage was proof of adultery. In some cases the council might be satisfied of that by proof of the decree coupled with transcript of the judgment. If there is no dispute on the facts that may well be sufficient for them. At the same time they are under a duty to make due inquiry, and, if the facts are in dispute, according to the ordinary principles of the administration of justice they must hear the one against whom an accusation is made and any witnesses whom he desires to call. The standing orders of the council show the procedure normally followed, and I do not know why they should not apply to this case. Rule 9 of the schedule to chap. XIV. of the standing orders lays down what should be done. After the solicitor or counsel representing the council has stated the facts of the case and produced the evidence in support of so much of it as is not admitted, "The practitioner will then be called upon by the "president to state his case, and to produce the evidence in "support of it. He may address the council either before or "at the conclusion of his evidence, but only once." Rule 10 says: "Evidence may be taken by the council by oral "statement, or by written deposition or statement . . . ." It may well be said to be inconvenient to have some part of the evidence in one form and some in another, but that difficulty is not insurmountable.

The answer to the problem with which we are confronted can be expressed in a few words. The legislature has made proof of a conviction conclusive. It has not done so in the case of a decree or order of a judge sitting in divorce. The council does not hold due inquiry (when there is a dispute as to the facts) merely by ascertaining that someone else has made due inquiry and has come to a decision in a cause or suit between different parties. The whole professional future of the practitioner is at stake and the council is charged with the duty of making due inquiry. It cannot delegate the duty. *Partington* v. *Partington* (1) was cited to us as showing that a finding in one suit that a man had committed adultery is not conclusive in another suit between different parties in the same Division. The production of the decree is evidence of adultery, but it does not preclude the alleged adulterer from denying it. That was a decision of Horridge J. after consultation with the President. I regard the present case as an a fortiori case. It is possible (though not likely) that a man for what might seem to him good reason would allow a suit in which he was cited as co-respondent to go through without strenuous opposition, and yet desire to contest the facts if he was attacked later in a professional capacity. In my view, he is entitled so to do under the terms of the statute.

It was pointed out to us by Mr. Beyfus how inconvenient it would be to have a rehearing on the issue of adultery and how difficult it would be for a large number of professional men who form the General Medical Council. These are matters for the legislature and not for us. Members of the medical profession desire to be, and they ought to be, masters within their own household, but they are governed by the terms of the Act which gives them their powers. And a further consideration arises. The evidence of witnesses not called in the Divorce Court might have weighed with the council on the question whether they should order the practitioner's name to be erased from the register even if they had been satisfied of adultery. We do not know what the witnesses would have said. The council refused to hear them because of their practice, to which I have already referred. In this I think they were wrong. I do not overlook the affidavit of Mr. Heseltine (the registrar) in para. 14 of which he deposes

(1) [1925] P. 34.

that the decree is accepted "unless some special circumstances are shown to exist." So far as I can find, no question of this kind was raised, and the evidence was rejected because of the practice not to hear witnesses who were available (but not called) on the hearing of the suit in the Divorce Division.

For the reasons I have given I do not consider that the council made due inquiry within the meaning of s. 29 of the Medical Act, 1858, and, that being so, the applicant is entitled to the relief for which he asks. Thus I find myself, to my regret, differing from my Lord and Humphreys J.

Application refused.
R. F. S.

C. A.

The applicant appealed.

Havers K.C. and *Dickens* for the applicant.

Beyfus K.C. and *Douglas Bartley* for the council.

The arguments were substantially those adduced before the Divisional Court, but the following additional cases were cited: for the applicant, *Allbutt* v. *General Medical Council* (1); for the council, *Reg.* v. *Staines Union* (2).

Cur. adv. vult.

1942. June 18. The following judgments were read.

MACKINNON L.J. I cannot agree with the view of the majority of the Divisional Court. With the reasoning of Singleton J. I entirely agree. It would, indeed, suffice if I said that I adopted his judgment in its entirety as my reason for allowing this appeal. But I will express my view shortly. The language of s. 29 of the Act draws a sharp distinction between a case in which a doctor has been convicted of a criminal offence and one in which he is alleged otherwise to have misconducted himself. In the former case mere proof of the conviction gives the council their power of disciplinary action. In the latter they acquire the power if after "due "inquiry" they are satisfied that the offence has been committed. "Due inquiry" cannot imply all the formal exactness of a trial in a court of law. The council has no power to summon witnesses and no power to administer an oath. It can, of course, inform itself of the facts without formality and without observance of any technical rules of evidence. It could, in this case, have had recourse to the shorthand notes

(1) (1889) 23 Q. B. D. 400.

(2) (1893) 62 L. J. (Q. B.) 540.

of the evidence before Langton J. for the facts and to a report of his judgment for assistance as to the interpretation of those facts, but "due inquiry" does involve at least a full and fair consideration of any evidence that the accused desires to offer, and, if he tenders them, hearing his witnesses. That, indeed, is recognized by para. (*b*) of the council's r. 9. I think the only mistake of the council (or perhaps rather of their legal assessor) was the assimilation of the hearing before them to a case in the Court of Appeal and the consequent ruling that further evidence ought not to be admitted if it was available and could have been adduced before Langton J. The hearing before the council is in no sense an appeal from any other tribunal and the supposed analogy is false and misleading. On the ground, therefore, that the council failed to hold due inquiry, in that they declined to hear the witnesses whom the solicitor for the accused desired to call, I think the decision of the majority in the Divisional Court was incorrect and that this appeal should be allowed.

I would add that I do not think that there is any ground for the suggested apprehension that the "due inquiry" in such a case—or in this case if a second inquiry is embarked on—may involve the council in a lengthy hearing comparable to that before Langton J., or the recalling of witnesses who gave evidence before him. I have said that the council in such a case is perfectly entitled to resort to the shorthand notes of the evidence given, or documents put in, in the trial in the Divorce Court. The one and only criticism that I am afraid I must make on the nature of the inquiry is the unfortunate refusal to hear the further evidence tendered by the accused. If those witnesses had been called, and listened to, and the council had then come to the same conclusion as that which they announced, no possible objection could be raised to the proceedings, and no possible suggestion that the requirement of a due inquiry under the section had not been complied with. The appeal must be allowed, and the order asked for must be granted.

GODDARD L.J. I agree with the judgment of my Lord and with that of Singleton J., except on one minor point dealt with by the latter. He gave as one reason for admitting the evidence tendered by Dr. Spackman that it might have gone in mitigation of sentence. The evidence, however, was not tendered for that purpose, but solely to refute adultery.

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Moreover, it may well be that when a medical practitioner commits so grave an offence as adultery with a female patient, the council always pass sentence of removal from the register. Indeed, the statute provides no other sanction for infamous conduct, though, no doubt, in appropriate cases the council can and do suspend sentence to give a practitioner the opportunity of mending his ways. This course would, I should think, never be taken in a case of adultery with a patient. If, then, in a case of a serious nature evidence in mitigation is tendered and the council refuses to hear it, I think they would be well within their rights and their decision could not be challenged.

I also desire to add a word on a matter already dealt with by my Lord. We are not deciding that the council are bound to have the adultery proved over again in the sense that in every case they must have the witnesses to the adultery before them. Whether the case before them is disputed or undisputed there can be no reason why they should not accept, if they see fit, the decree as prima facie evidence that adultery was committed, but if the respondent before them desires to dispute the finding, in my opinion, they must hear him and his witnesses. The proceedings are in no sense an appeal and are between parties different from those who were before the court. It may happen that the evidence adduced by the respondent will make it necessary for the complainant to call evidence to rebut it, and it is said that there is no power to compel the attendance of witnesses, but neither is there in any other case in which it is necessary for the council to hear evidence, such, for instance, as one reported in the minutes of the proceedings before the council which is exhibited in the present case. This difficulty, I think, must be more apparent than real, but if difficulty there be its removal must be sought from the legislature and not from the courts.

Lord Clauson. I asked Goddard L.J. to deliver his judgment first because I find myself in complete agreement not only with the reasons given for the decision by MacKinnon L.J., but also with the observations which Goddard L.J. has made.

Appeal allowed.

Solicitors for applicant: *Hempsons.*
Solicitors for council: *Waterhouse & Co.*

J. W. H.

CARR *v.* JAMES BRODERICK AND COMPANY, LIMITED.

1942
July 2, 7.

Hire-purchase—Arrears in payment—Seizure of goods—No action by owners and no leave of court obtained—Remedy of hirer—Measure of damages—Hire-Purchase Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 53), *s.* 11, *sub-s.* 2 (*a*)—*Courts* (*Emergency Powers*) *Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (*ii.*).

By a hire-purchase agreement a hirer took furniture from the owners on hire-purchase terms, the hire-purchase price, which was to be paid by an initial payment and weekly instalments, being 46*l.* 10*s.* When the hirer had paid 18*l.* 4*s.* 6*d.* under the agreement he fell into arrear, and the owners, without seeking by action to recover the goods under s. 11, sub-s. 1, of the Hire-Purchase Act, 1938, or obtaining leave to take possession of them under s. 1, sub-s. 2 (*a*) (ii.), of the Courts (Emergency Powers) Act, 1939, seized the goods. In an action by the hirer against the owners claiming damages for conversion, detinue, and failure to comply with the provisions of the Hire-Purchase Act, 1938, and the Courts (Emergency Powers) Act, 1939 :—

Held, that the claims in conversion and detinue must fail since (i.) the property in the goods had always been in the owners and, although the hirer could only properly be deprived of possession by an action, he had no right to possession as default had been made in the payments under the agreement, and (ii.) the agreement had been determined by s. 11, sub-s. 2, of the Hire-Purchase Act, 1938, the effect of para. (*a*) of which was that the only remedy given to the hirer when the owner siezes the goods without bringing an action is to recover from the owner, in an action for money had and received, all sums paid by the hirer under the agreement.

Held, further, that an action in the nature of an action on the case would lie for damage suffered by the hirer as the result of the failure of the owners to obtain the leave of the court to take possession of the goods under the Courts (Emergency Powers) Act, 1939, and that in such an action, in the absence of proof of some other head of damage such as a rise in the value of the goods or inconvenience to the hirer, the hirer was entitled, as damages, to the difference between 46*l.* 10*s.*, the price of the goods, and 28*l.* 5*s.* 6*d.*, which was already in arrear and, therefore, due and payable, at the date of the seizure of the goods, namely, 18*l.* 4*s.* 6*d.*, the sum which had been paid under the agreement. *Semble*, that this measure of damages is not confined to cases where the price of the goods does not exceed 100*l.* so that the Hire-Purchase Act, 1938, applies, but it applies to any case where leave has not been obtained under the Courts (Emergency Powers) Act, 1939, other specific damage being recoverable if proved.

Bowmaker, Ld. v. *Tabor* [1941] 2 K. B. 1 applied.

Semble, s.12, sub-s. 7, of the Hire-Purchase Act, 1938, contemplates a claim by the hirer against the owner for damages for something other than the wrongful retaking of the goods, for example, trespass on the hirer's premises in the course of the retaking.

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ACTION tried by Goddard L.J., sitting as an additional judge of the King's Bench Division, without a jury.

On February 5, 1938, the plaintiff entered into a hire-purchase agreement with the defendants under which he took on hire-purchase terms furniture at a price of 46*l.* 10*s.*, making an initial payment and agreeing to pay weekly instalments of 5*s.* 6*d.* As the value of the goods did not exceed 100*l.* the Hire-Purchase Act, 1938 (1), applied to the transaction. In June, 1939, the payments fell into arrear, the amount paid up to this date being 17*l.* 14*s.* 6*d.* In August, 1939, the plaintiff went on war service, and thereafter his wife paid a further 10*s.*, but no more, the total amount paid, therefore, being 18*l.* 4*s.* 6*d.* In July, 1940, the plaintiff's wife received and opened a letter addressed by the defendants' solicitors to her husband in which they stated: "We are now instructed "to give you this last opportunity. Unless the arrears . . . . "are paid within seven days and future payments made "promptly, we shall, without further notice to you, issue a "summons against you for the return of the furniture to our "clients. You may wish to avoid the cost to yourself of such "a court action by agreeing to return the goods (or part) to "our clients. In this case please sign the enclosed note of "authority and return to us, whereupon we shall arrange for "a stay of proceedings." A slip was enclosed which read: "I hereby authorize Messrs. James Broderick & Co., Ld., by "their servants or agents to enter on any premises occupied "by me and to retake possession of the goods comprised in "the above agreement wherever they may be found." In consequence of the option which the letter gave the plaintiff of returning the whole or part of the furniture the plaintiff's wife wrote on the back of the form that she wanted to return a "three-piece" suite of which the price was 12*l.* 1*s.* 6*d.* In October, 1940, the plaintiff's wife and her infant child were sent under the evacuation scheme to Somerset, and before going she moved the furniture to her father's house. On February 19, 1941, the defendants' van went to this house and removed all the goods. The defendants did not proceed by action, as they should have done under the Hire-Purchase Act, 1938, nor did they make any application for leave to take possession of the property under the Courts (Emergency Powers) Act, 1939 (2). The plaintiff's wife refused to accept the

(1) See s. 1 (*c*).

(2) By Hire-Purchase Act, 1938, s. 11, sub-s. 1: "Where goods have "been let under a hire-purchase

18*l*. 4*s*. 6*d*. which the defendants offered, to a claim for which they would have had no defence had an action under s. 11, sub-s. 2, of the Hire-Purchase Act, 1938, been brought. It was not disputed that throughout the plaintiff's wife was acting on his behalf. In February, 1942, the plaintiff began the present action, alleging that the defendants had unlawfully and in breach of the provisions of the Hire-Purchase Act, 1938, and/or the provisions of the Courts (Emergency Powers) Act, 1939, seized and carried away the furniture and had subsequently failed to return it to the plaintiff thereby converting it to their own use and wrongfully depriving the plaintiff of it, and claiming damages for conversion and detinue.

Levene for plaintiff.
Stenham for defendant.

Cur. adv. vult.

1942. July 7. GODDARD L.J. read a judgment in which he stated the facts substantially as set out above, and continued: I am quite satisfied that when the defendants seized the goods they were in fact seizing, and, indeed, were purporting to seize, them under the powers given by the agreement. On this point the case is indistinguishable from *Bowmaker, Ld.* v. *Tabor* (1), except that in this case the Hire-Purchase Act, 1938, also applies which it did not in the case cited. So far as the three-piece suite was concerned there was no more than a submission by the hirer to the owner exercising his right to

"agreement and one-third of the "hire-purchase price has been "paid, whether in pursuance of a "judgment or otherwise . . . . "the owner shall not enforce any "right to recover possession of the "goods from the hirer otherwise "than by action."

Sub-s. 2: "If an owner recovers "possession of goods in contra-"vention of the foregoing sub-"section, the hire-purchase agree-"ment, if not previously deter-"mined, shall determine, and— "(*a*) the hirer shall be released "from all liability under the "agreement and shall be entitled "to recover from the owner in an "action for money had and "received all sums paid by the "hirer under the agreement or "under any security given him "in respect thereof . . . ."

By Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2: "Subject "to the provisions of this section, "a person shall not be entitled, "except with the leave of the "appropriate court—(*a*) to pro-"ceed to exercise any remedy "which is available to him by way "of . . . . (ii.) the taking of posses-"sion of any property . . . ."

(1) [1941] 2 K. B. 1.

seize, and as to the rest of the goods there was no submission or consent at all. The defendants appear to have admitted their error in not having proceeded by action under the Hire-Purchase Act, 1938. Had they done so, no doubt, once the judge had decided what would have been the fair order to make under s. 12, leave to proceed under the Courts (Emergency Powers) Act, 1939, would have followed as of course.

In my opinion, the plaintiff cannot succeed in the present proceedings either on a claim in detinue or on one in conversion. The property in the goods is and always was in the defendants. The plaintiff had no right to possession as default had been made in the payment of instalments, although he could only be properly deprived of possession by an action. I see no ground on which it is possible to order a return of the goods. Moreover, the defendants have retaken possession, and, therefore, apart from any other consideration, the agreement has been determined by virtue of s. 11, sub-s. 2, of the Hire-Purchase Act, 1938, para. (*a*) of which gives a remedy to the hirer in these circumstances to recover in an action for money had and received all that has been paid. I may here remark that, although I have found that the consent to seize was only given in respect of part of the goods and not, as the defendants desire to contend, in respect of the whole, this is quite immaterial. The section says: " If the owner recovers " possession of goods "—not of all the goods—" the agreement "shall determine." On the other hand, while I do not decide that the hirer may not, under the Hire-Purchase Act, 1938, voluntarily agree to the owner taking a part of the goods and making a new agreement with regard to what is left and express no opinion one way or the other on this, the defendants certainly could not have taken a part in the circumstances of this case without obtaining leave under the Courts (Emergency Powers) Act, 1939: see *Bowmaker, Ld.* v. *Tabor* (1). It seems to me that the remedy by way of action for money had and received is the only remedy given by the Hire-Purchase Act, 1938, to the hirer when the owner proceeds to seize without bringing an action. It is true that sub-s. 7 of s. 12 seems to contemplate an award of damages, which must mean by way of counterclaim, against the owner, but I think that that sub-section must contemplate damages in respect of something other than the actual retaking of the goods, for instance, for trespass on the house in the course of retaking. Be that as it may, for the reasons

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I have endeavoured to give, I am satisfied that no action of detinue lies. For much the same reason no action lies for conversion. The goods were and are the defendants' and the plaintiff has no title to possession of them. So far, then, as the plaintiffs' claim is based on the defendants' failure to obtain leave to seize under the Hire-Purchase Act, 1938, his only remedy is to recover the amount paid as money had and received to his use, and this he has not claimed.

But has the plaintiff a remedy because the defendants made no application under the Courts (Emergency Powers) Act, 1939? *Bowmaker, Ld.* v. *Tabor* (1) is a direct authority that an action for damages will lie in these circumstances. In my opinion, the action which will lie is in the nature of an action on the case for damages sustained by the plaintiff on account of the disregard of the statute by the defendants. In all actions on the case damage is the gist of the action, and the real question which arises is: What is the measure of damage. The report of *Bowmaker, Ld.* v. *Tabor* (1) does not say what damages were awarded, but reference to the county court judge's note shows that he assessed the value of the car, found the amount of arrears and further instalments, set off one sum against the other, and entered judgment for the defendant (the hirer) for the balance on the counterclaim. In the present case I cannot speculate on what order would have been made had the defendants brought an action under s. 11 of the Hire-Purchase Act or applied for leave under the Courts (Emergency Powers) Act. Had an action been brought, s. 12 of the Hire-Purchase Act gives the court power to make very much the same sort of order or to give the same sort of relief as does the Courts (Emergency Powers) Act, although the latter is, perhaps, rather wider in its terms, but, of course, the plaintiff could not have been allowed to keep the goods without ever paying for them, though the obligation to pay might have been postponed. So the result would have been that, had the plaintiff been allowed to retain possession, he would have had goods to the value of 46*l.* 10*s.*, with a liability to pay a further 28*l.* 5*s.* 6*d.*, which sum was already in arrear, and, therefore, due and payable at the date of the seizure. I do not see how on any fair estimation I can put the damages higher than the difference between these two sums, which is, of course, the amount which has been paid. It was suggested that I should take into account the rise in the value of furniture, but no evidence was offered on this point, nor was there any

(1) [1941] 2 K. B. 1.

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evidence that the plaintiff had suffered any inconvenience. He was in the Army. His wife was no party to the contract and there was no evidence that the plaintiff had been put to any extra expense by reason of the removal. I do not see how it would be right to award the plaintiff more than could have been recovered had proceedings been taken for the remedy provided by the Hire-Purchase Act in the absence of proof of some other head of damage, because, as I have already said, the same considerations are to be borne in mind when the court is asked to grant an order to seize under that Act as when leave to proceed under the Courts (Emergency Powers) Act is sought. It seems to me inconceivable that when once the court had decided on the proper order to make under the Hire-Purchase Act, leave to proceed, if the terms imposed were not observed or if an order to seize were granted, would be refused under the Courts (Emergency Powers) Act. That this appeared to the legislature as the appropriate measure seems apparent from the Hire-Purchase Act, although, I confess, I do not understand why the recovery is to be by way of an action for money had and received which is an action based on quasi-contract and not in tort. In my opinion, this measure is not to be confined to cases where the value of the goods does not exceed 100*l.* so that the Hire-Purchase Act applies, but it applies to any case where leave has not been obtained under the Courts (Emergency Powers) Act, although I do not say that other specific damage may not be recovered if proved. The plaintiff thereby recovers an amount equivalent to what has been paid, and so has the money in hand to embark, if he sees fit, on another hire-purchase transaction, and, moreover, he has had the substantial advantage of having had the use of the furniture for a considerable time. In the present case the plaintiff and his wife had had the furniture from February, 1938, to February, 1941.

[His Lordship gave leave to amend the statement of claim by adding a claim for damages caused by the failure of the defendants to apply for leave to take possession of the goods under the Courts (Emergency Powers) Act, 1939, and he gave judgment for the plaintiff for 18*l.* 4*s.* 6*d.*]

Judgment for plaintiff.

Solicitors for plaintiff: *James Brodie & Co.*
Solicitors for defendants: *Arthur S. Joseph & Cates.*

G. F. L. B.

REX *v.* GOVERNOR OF BRIXTON PRISON.

Ex parte LANNOY.

C. A.
1942
June 22, 23; *July* 9.

Alien—Detention—Leave to land—Refusal by immigration officer—No preceding request by, or intention of, alien to land—Aliens Order, 1920 (*St. R. & O.*, 1920, *No.* 448), *art.* 3 (4.).

When an alien is brought to this country under naval escort, an immigration officer is acting within the authority conferred by art. 1 (1.) (*a*) and art. 3 (4.), of the Aliens Order, 1920, as amended, in going on board the ship, refusing the alien leave to land, and then directing his detention. The granting of leave to land is merely the lifting of the prohibition against landing without leave imposed by art. 1 (1.) (*a*), and refusal of leave to land under art. 3 (4.) is an intimation that the prohibition will not be lifted. Leave to land can, therefore, be refused wherever a landing, whether voluntary or involuntary is in contemplation, although there has been no request for such leave, express or implied.

Detention under art. 3 (4.) is only intended to be temporary detention to enable inquiries to be made. Where an alien was detained under the direction of the immigration officer from December 22, 1941, to March 13, 1942, for inquiries to be made, the period of detention was *held* not to be excessive.

Decision of Divisional Court (ante p. 73) affirmed.

Appeal from Divisional Court.

On October 30, 1941, the applicant, a Belgian national, embarked at Lisbon in a Portuguese vessel bound for Angola from which place he intended to proceed to the Belgian Congo. On November 7, 1941, the vessel was stopped by one of His Majesty's destroyers. The applicant was placed under arrest and taken on board the destroyer. On the same evening he was landed at Freetown, Sierra Leone. On November 28, 1941, an expulsion order was made against the applicant by the deputy governor under the relevant ordinance of Sierra Leone. By that order the applicant was directed to leave the colony and protectorate of Sierra Leone within seven days of its making. The order did not mention any place to which he was to proceed, or prescribe the method by which he was to leave the colony. The applicant remained under arrest, and on November 29, 1941, he was placed on board the steamship *Vollendam*, which was under requisition to His Majesty's government at the time, and taken in that vessel to Avonmouth in charge of a naval escort. On arriving at Avonmouth on December 21, 1941, the applicant did

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not ask for leave to land. The immigration officer saw the applicant on board, told him that he would be refused leave to land, and handed him a refusal slip in accordance with the usual procedure. The refusal slip referred to art. 1 (1.) (*a*) of the Aliens Order, 1920 (1), as the grounds of refusal. The applicant was immediately arrested by a constable, and on December 22, 1941, he was lodged in Brixton Prison, where he remained under detention. The arrest of the applicant, his removal to Brixton Prison, and, down to March 13, 1942, his detention there took place pursuant to the instructions of the immigration officer who purported to act in that behalf under art. 3 (4.) (*b*) of the Aliens Order, 1920 (1). On February 27, 1942, the applicant applied to Asquith J. for a writ of habeas corpus. This application was adjourned for hearing by a Divisional Court, but, on March 13, 1942, before it could be heard, an order was made by the Home Secretary under art. 5A of the Aliens Order, 1920, as amended (1), directing that the applicant be detained. Thereafter the applicant

(1) By Aliens Order (as amended, art. 1 (1.): " . . . . An "alien coming by sea to a place "in the United Kingdom . . . . (*a*) "shall not land in the United "Kingdom without the leave of "an immigration officer" . . . . (3.) "Leave shall not be given to "an alien to land in the United "Kingdom unless he complies "with" a number of specified conditions.

Art. 3 (4.): "Where leave to "land is refused to an alien, the "alien may either—(*a*) with the "leave of an immigration officer, "be placed temporarily on shore "and detained at some place "approved by the Secretary of "State; or (*b*) be removed from "the ship by, or under the "directions of, an immigration "officer, and so detained; and "whilst an alien is so detained "he shall be deemed to be in "legal custody and not to have "landed . . . ." (5.) (*a*) "Any "alien to whom this sub-section "applies shall be removed from "the United Kingdom by the "master of the ship in which "he arrived or, if directions for "the purpose are given by the "Secretary of State or an immigration officer, by the owner or "agents of that ship, to the "country of which he is a national "or from which he embarked for "the United Kingdom . . . ."

Art. 5A [added by joint effect of St. R. & O., 1941, No. 1774, amending reg. 20A of the Defence (General) Regulations, 1939, and the Aliens (No. 2) Order, 1941 (St. R. & O., 1941, No. 1902)]: "Where the Secretary of State "is satisfied that any alien has "been brought or sent to the "United Kingdom by order of a "competent naval, military or "air force authority, he may, if "in his opinion it is necessary "or expedient so to do for "securing the public safety, the "defence of the realm, the maintenance of public order or the "efficient prosecution of any war "in which His Majesty may be "engaged, direct that the alien "be detained."

was detained by virtue of that order. The legality of that detention was not disputed, and, accordingly, when the application came on to be heard by a Divisional Court on March 31, 1942, the only matter which fell for decision was that of costs. To decide that matter the Divisional Court examined the legality of the detention of the applicant in Brixton Prison down to March 13, 1942, and came to the conclusion by a majority (Humphreys and Singleton JJ., Viscount Caldecote C.J., dissenting) that the detention was lawful. The result was that the application was dismissed and the applicant was ordered to pay the costs. The applicant appealed.

G. O. Slade for the applicant. The applicant was illegally detained from December 22, 1941, to March 13, 1942, and he is, therefore, entitled to the costs of his application for a writ of habeas corpus on February 27, 1942. Art. 1 (1.) (*a*) of the Aliens Order, 1920, makes it impossible for an alien to land without the leave of an immigration officer, and under art. 3 (4.) " where leave to land is refused to an alien " the alien may " be removed from the ship by, or under the directions "of, an immigration officer, and so detained." Here the applicant was not refused leave to land as he had never asked for it and did not wish to land. " Refused " in art. 3 (4.) cannot be given the meaning " not allowed." It involves the alien wishing to land and requesting leave to do so either expressly or impliedly. When a man is forced ashore by an escort he cannot be said to be landing or attempting to land. If an immigration officer can go on board a ship, refuse leave to land to a person who has no wish to land, and forthwith order his removal from the ship and his detention, it would follow that the immigration officer could do this to a passenger in a liner who was proceeding to another country. To use the machinery set up under the Aliens Order, 1920, to detain in this country a man who was brought here against his will under arrest is to seek to use the power conferred on the immigration officer in a manner contrary to what was intended. To bring an alien here and then to imprison him is an abuse of an order intended to enable the Crown to get rid of aliens: see *Rex* v. *Governor of Brixton Prison* (1) and *Eshugbayi Eleko* v. *Officer Administering Government of Nigeria* (2). Further, any detention by the immigration officer must be temporary: see art. 3 (4.) (*a*). Its object is to enable inquiries to be made so

(1) [1916] 2 K. B. 742.
(2) [1931] A. C. 670.

that the Secretary of State may decide what course to adopt. For such a purpose the period of detention from December 22, 1941, to March 13, 1942, was excessive.

Sir Donald Somervell A.-G. and *Valentine Holmes* for the respondent. Under art. 1 (1.) (*a*) and art. 3 (4.) the immigration officer has had placed on him the obligation to control the landing of aliens with a view to preventing the landing, with full liberty, of those persons who ought not to be allowed to do so. Landing means in these provisions landing with full liberty, and as soon as a naval escort has landed a man in this country, their control is gone and the man is at liberty. The refusal of leave to land applies to voluntary or involuntary landing, for the same evil has to be guarded against whether the alien lands voluntarily or involuntarily. The whole difficulty is met by the immigration officer refusing the alien leave to land and then directing his detention. The words "when "leave to land is refused," as a condition precedent to the exercise of the power of detention, do not cut down the power so as to prevent its exercise when a person is landed involuntarily. This argument does not involve, as was suggested, an immigration officer having power to detain a passenger in a ship proceeding to a foreign port. There must be a voluntary or involuntary purpose to land. It is admitted that detention under art. 3 (4.) (*b*) means temporary detention, but the time during which the applicant was detained was not excessive.

Slade replied.

Cur. adv. vult.

July 9. Lord Greene M.R. read the following judgment of the court (Lord Greene M.R., MacKinnon and Goddard L.JJ.). As was the case before the Divisional Court, the question of the legality of the applicant's detention is only of importance by reason of its effect on costs. Two main arguments were presented to us on behalf of the applicant. The first was that the powers conferred on the immigration officer by art. 3 (4.) of the Aliens Order, 1920, never became exercisable in that no refusal of leave to land can take place unless there has been a request for such leave, express or implied, and in the present case there was not any such request. Accordingly, it was said, the direction given by the immigration officer for the detention of the applicant and his subsequent detention down to March 13, 1942, were invalid and illegal. It is perfectly true that there was no express request for leave. Whether or not such a request ought to be implied in the circumstances is a more difficult question. The applicant had no desire to come to this country. He was in custody, and, if he had been put ashore by the naval escort, his landing would have been involuntary. On the other hand, things being as they were, and apart from any question of compulsion, it is difficult to see what other course save landing was open to the applicant. He could not have remained in the ship. A voyage to the Belgian Congo was out of the question. Indeed, to travel to any part of the world to which travel was possible he would have had to land first. If it had been necessary to decide the question, we should have held that he was in fact proposing to land, notwithstanding that such a step would have been incompatible with his original intention to proceed to the Belgian Congo and notwithstanding that he would have been put ashore compulsorily. It is, however, in our opinion, sufficient to say that he was in fact going to be landed, and that, but for the intervention of the immigration officer, he would thereafter have been a free man since neither the naval escort nor the police would have had any power to restrict the liberty of his movements. This could only have been done if an order in that behalf had been made under appropriate powers—e.g., an order under art. 5A—and no such order had at that time been made.

The question, therefore, is, had the immigration officer power to refuse leave to land in these circumstances ? If he had, his power to direct detention necessarily followed, although the length of time for which the detention could lawfully continue gives rise to a separate question, with which we will deal later. In our opinion, the power to refuse leave to land did arise. Under art. 1 (1.) (*a*) landing without leave is prohibited. The giving of leave is merely the lifting of this prohibition. The refusal of leave is merely an intimation that the prohibition will not be lifted, and does not, in our opinion, require any antecedent request for leave, express or implied. It is said that this construction would enable an immigration officer to board a vessel which touched at a British port on its way to a foreign port, go up to a passenger bound for that foreign port who had no intention of landing in the United Kingdom, say to him that leave to land in the United Kingdom was refused, remove him from the ship, and order his detention in a British gaol. The learned Lord Chief Justice accepted this argument, but with great respect we are unable to agree with him. The order has no application to persons who are not going to land. It deals with aliens who, but for its provisions, are going to enter this country, not with aliens who are not going to enter this country. A landing, whether voluntary or involuntary, must be in contemplation before the machinery can be set in motion. It is unnecessary to consider whether or not the order has any application to aliens who are brought to this country in lawful custody and will continue to remain in lawful custody after landing, since in the present case, the applicant, once landed, would from that moment have been a free man, as we have already pointed out. The contention of the applicant that the power of detention does not arise in the case of an involuntary landing would, if correct, leave a considerable gap in the scope of the order. For example, an alien might, for reasons of his own, sail from a British port to a foreign country, the authorities of which might refuse him leave to land, and direct the master to take him back to the United Kingdom. On arrival here the master would put him ashore against his will. Once landed, he would be a free man. Under art. 1 (1.) he could not land without leave, and if he failed to comply with the conditions mentioned in art. 1 (3.) leave could not be given. To say that in such a case the language of art. 3 (4.) would not apply appears to us to be quite unarguable.

A further question arises as to the length of time during which an alien can lawfully be detained under art. 3 (4.). That paragraph gives no express indication as to the time during which or the purpose for which the detention is to take place. It was introduced into the order on September 1, 1939, and may be regarded as a wartime measure. Even from that point of view it is very unsatisfactory. The Attorney-General, on behalf of the respondent, said that the detention must, by implication, be of a temporary character. We will assume that this is correct without considering whether such a limitation can be extracted from the language. It may be that at the time when the paragraph was introduced it was contemplated that the procedure to be followed would be that of deportation under para. (5.), or a deportation order under Part II. of the order, but in most cases, at any rate, such procedure cannot in present circumstances be made effective. What then is the position of the alien detained under para. (4.) ? Is it to be left to the court to decide when a detention ceases to be temporary, assuming that only a temporary detention is permissible? And what circumstances can be relied on by the Home Secretary to justify even a temporary detention? It is, to our minds, very unfortunate that there should exist a power to detain a person for an unspecified purpose for an indeterminate time, and it is to be hoped that such an unsatisfactory provision will not be allowed to remain in the order when more normal conditions return. In the present case the applicant was detained in order that inquiries might be made, and we think that a detention for that purpose was legitimate. Moreover, we do not think it right to say, on the evidence, that the time which elapsed between the original detention and March 13 was unreasonably long in the circumstances. In our opinion, therefore, there is no ground on this branch of the argument for saying that the detention was at any stage illegal.

The case for the applicant was also put on a much broader ground. It was said that the Aliens Order had been used for a purpose quite other than that for which it was intended. The object of the order is, it was said, to prevent aliens from landing who wish to land in the United Kingdom; but in the present case its powers have been used for the purpose of placing under detention a person who never wished to come here at all, but whom the authorities desired to keep under their hand for other reasons. This argument is not, in our opinion, a sound one. The order made by the deputy governor of Sierra Leone led to the lawful expulsion of the applicant from that colony. The decision to bring him to the United Kingdom on the steamship *Vollendam*, whosesoever decision it was, cannot be assailed as illegal. On his arrival here the applicant was in fact going to be landed, and when landed would in fact have been a free man. The earlier events appear to us to be irrelevant. All that has to be considered is the position as it was in fact at the moment when leave to land was refused. That position was, as we have said, that an alien was about to be landed in the United Kingdom, that this could not happen without leave, and that leave was refused. We see nothing to justify the proposition that the powers given by the order were abused in the sense suggested. The appeal must be dismissed, with costs.

Appeal dismissed.

Solicitors for applicant: *Buckeridge & Braune.*
Solicitor for respondent: *Treasury Solicitor.*

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July 10, 13.

CARTER *v.* S. U. CARBURETTER COMPANY.

Landlord and tenant—Rent restriction—Dwelling-house—Protection given to tenant a right in rem—Limited company entitled to protection—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 1—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *Sch. I.*

A house was let in 1935 at a rental of 104*l.* The tenant relinquished the tenancy, and in October, 1941, a limited company became tenants under a written agreement at a rental of 150*l.* They sublet the whole of the house to three of their employees at rentals amounting in all to 150*l.* The three employees did not occupy the house as agents or representatives of the company, but simply as sub-tenants. In December, 1941, the company refused to pay a rental at more than the rate of 104*l.* per annum, claiming that they were entitled to the protection of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939:—

Held, following *King* v. *York* (1), that the right of a tenant to have a standard rent fixed for a house is a right in rem, and not in personam, and that under s. 1 of the Act of 1920 the company was entitled to the protection of the Acts and that nothing in the subsequent Acts had derogated from its right to such protection.

APPEAL from Otley county court.

The plaintiff was the owner of a dwelling-house which he had let in 1935 to one Phillips at a rental of 104*l.*, the rateable value being 70*l.* Phillips relinquished the tenancy, and on October 1, 1941, the defendant company became tenants of the house for three years from that date on the terms of a written agreement at a rental of 150*l.* The company sublet the whole of the house to three of their employees at rentals amounting in all to 150*l.* The three employees did not occupy the house as agents or representatives of the company, but simply as sub-tenants. The plaintiff claimed 34*l.* 18*s.* 7*d.* as rent due to him from the company for the period October 1 to December 25, 1941. The company admitted owing 24*l.* 4*s.* 4*d.*, which sum they brought into court. They disputed liability for the balance of 10*l.* 14*s.* 3*d.* on the ground that that was the amount by which the sum claimed exceeded the rent permitted by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. The county court judge held that limited companies could not claim protection under the Acts, and the company appealed.

(1) [1919] W. N. 59; 88 L. J. (K. B.) 839.

Sir D. Maxwell Fyfe S.-G. and *R. Hopkins* for the company. When a standard rent has been fixed for a dwelling-house within the Rent Restriction Acts a right in rem comes into existence and any future tenant of the house comes under the protection of the Acts and cannot be compelled to pay more than the standard rent, so long as the premises are used only as a dwelling-house: *King* v. *York* (1). That case has never been challenged, and, although it was decided on the provisions of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, it applies equally to the 1920–1939 Acts. This case comes entirely under s. 1 of the Act of 1920, as amended by the Act of 1939. That section is worded in the widest terms, giving the protection of the Acts to all tenants whether they are themselves in actual possession of the house or not, and notwithstanding any agreement to the contrary. There is nothing in that section to exclude a limited company from the protection of the Acts. The standard rent for the house in question here is 104*l.*, and the plaintiff is not entitled to any higher rent from the company or any other tenant. There are a number of cases and dicta implying that a tenant must be actually residing in the house himself, which would exclude a limited company, but they all deal with other sections of the Acts and do not apply here. Slesser L.J. in *Skinner* v. *Geary* (2) was dealing with s. 4 of the Act of 1923. *Hicks* v. *Scarsdale Brewery Co.* (3) dealt with s. 5 of the Act of 1920 and s. 4 of the Act of 1923. *Haskins* v. *Lewis* (4) dealt with ss. 12, 15 of the Act of 1920, and s. 4 of the Act of 1923. *Gidden* v. *Mills* (5) also dealt with ss. 5, 12 of the Act of 1920. *Reidy* v. *Walker* (6) and *Hiller* v. *United Dairies (London), Ld.* (7), both dealt with s. 4 of the Act of 1923. These cases do not affect a case coming under s. 1 of the Act of 1920, and the company are entitled to the protection given to tenants by that section.

Vaisey K.C. and *Beaton* for the plaintiff. It is quite true that *King* v. *York* (1) laid down that the right of a tenant is a right in rem and not a right in personam and that that decision has never been set aside, but that case was decided on an Act which was worded differently from the Act of 1920. It

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(1) [1919] W. N. 59; 88 L. J. (K. B.) 839.

(2) [1931] 2 K. B. 546, 569.

(3) [1924] W. N. 189.

(4) [1931] 2 K. B. 1.

(5) [1925] 2 K. B. 713.

(6) [1933] 2 K. B. 266.

(7) [1934] 1 K. B. 57

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is quite clear from *Reidy* v. *Walker* (1), *Hiller* v. *United Dairies* (*London*), *Ld.* (2), and the other cases mentioned that no one who is not in personal occupation of a dwelling-house can claim the protection of the Acts. A limited company cannot be in personal occupation of a house and, therefore, the plaintiff's claim must fail.

LORD GREENE M.R. I do not propose to occupy time by reading the amended provisions of s. 1 of the Act of 1920, which are to be found in the Act of 1939. It is sufficient to say that at one time the corresponding section of the Act then in force was the subject-matter of a decision of a Divisional Court in *King* v. *York* (3) where the question was whether the prohibition against the increase of rent which that section contained was applicable only in favour of the sitting tenant or whether it applied in favour of a tenant who had come in under a new tenancy. It was held by Lush J. and Sankey J. that the benefit of the section inured in favour of a new tenant and so on for tenant after tenant and was not confined to a sitting tenant. That decision has stood unchallenged and uncriticized since 1919. The original Act has been considerably amended and consolidated since that date, and there is no suggestion in any of those amendments that the effect of that decision was to be interfered with. In my opinion, the decision was correct, and there is nothing in any subsequent Act of Parliament which weakens its force. It is applicable to the section now in force, and the question, therefore, which arises, namely, whether this company is prima facie entitled to the benefit of the section, must be answered in their favour.

It is also urged on behalf of the plaintiff that it has been decided by a number of authorities, some of them in this court, that no person is entitled to any benefit of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, so far as dwelling-houses are concerned, except a person in actual personal occupation, and, as a limited company is incapable of personal occupation of a dwelling house, no protection is given to it by any part of the Act. When, however, the authorities in question are examined it will be found that every one of them is dealing with another part of the Act, to be found in s. 5 of the Act of 1920, now replaced

(1) [1933] 2 K. B. 266.
(2) [1934] 1 K. B. 57.
(3) [1919] W. N. 59.

by s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32). The effect of those sections is to prohibit a landlord from exercising the right to recover possession against a tenant who is prepared to go on paying the standard rent. In other words, that particular part of the Act deals with the case where the tenant has ceased to have a contractual tenancy, and the effect of the section is to give him what has been conveniently called a statutory tenancy which continues so long as he continues to pay the rent. The phrase " statutory tenancy," although convenient, must not be allowed to mislead. In truth and in fact, a tenant who takes the benefit of the Act after his lease has come to an end is not a tenant at all in the sense that he has an estate. He has, as has been held, a merely personal right of occupation, and, that being a merely personal right, the authorities to which I have referred decided that no person can claim the benefit of that part of the Act unless he is himself personally in occupation, and, as a logical consequence, that no limited company can ever claim the benefit of that part of the Act. I need not examine those decisions. Their effect may be beneficial, and it is no disrespect to say that they are courageous, but it seems to me that they have no application to the present case. The language of s. 1 says that the increased rent over and above the standard rent shall be irrecoverable from the tenant. There is no limitation on the word " tenant," and there is here no question of a statutory tenancy. We are dealing with a contractual tenancy where the tenant has got the contractual right to remain in possession. The sole question is whether s. 1 operates to strike out the contractual figure of rent in the lease and substitute the standard rent. Looking at the language of the section, construing it in relation to the definition of the word " tenant " which is to be found in the Act, and bearing in mind the decision in *King* v. *York* (1), it seems to me that on any sound principle of construction the question must be answered in favour of the company. There is no differentiation, express or implied, in the section, as against a limited company incapable of personal occupation and nothing to limit the effect of the section to individuals who are in occupation.

The authorities to which I have referred are founded on the peculiar position of a statutory tenant. They have no reference whatsoever to a situation such as that with which we have to deal, and apart from the language in which the opinions in those cases are couched, I should have thought myself that they could scarcely be referred to as authorities of any use in construing s. 1. Great reliance was very naturally placed on behalf of the plaintiff on the broad language in which some of the learned judges expressed their opinions. Putting it quite shortly, they used language which said that the protection of the Acts was intended to be limited to persons enjoying actual occupation. The first thing to observe is, that in using that language the learned judges had not before them the question which is before us. They were not considering s. 1. Its language was not considered, and the question they had to decide was a totally different one. I protest, with all respect, against the view that wide language used by judges in dealing with a particular class of protection given by an Act should be treated as applying to other and distinct parts of the Act which were not before them, which were never discussed, and which were not present to their minds. That is contrary to what I have always understood to be the proper way of construing judgments. That the language was really intended only to apply to that part of the Act with which they were dealing, namely, the part which protects a tenant from being dispossessed, appears quite clearly when it is carefully examined. I do not propose to go through the cases in detail, but I find in one of the leading cases relied on, *Skinner* v. *Geary* (1), that Scrutton L.J. says: "Parliament was dealing with a tenant who was in occupation "and who was not to be turned out; it was not dealing, and "never intended to deal, with a tenant who was not in "occupation but who wished to say: 'Although I am not in "'actual occupation I claim the right so long as I pay the "'rent to retain my tenancy' . . . . A non-occupying tenant "was in my opinion never within the precincts of the Acts, "which were dealing only with an occupying tenant who had "a right to stay in and not be turned out." I should have though it perfectly clear that Scrutton L.J. was there dealing only with the matter before him. His language shows that when he says that the Acts only protect the tenant in occupation, he is thinking of that part of the Act which quiets such a tenant in his occupation after his lease has come to an end, and is not directing his attention to the case where there is a contractual right to possession and the only question

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(1) [1919] W. N. 59; 88 L. J. (K. B.) 839.

(1) [1931] 2 K. B. 546, 560.

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is as to the rent which can be properly charged under s. 1.

Accordingly, I find myself with no option but to give effect to what seems to me to be the clear language of s. 1. It covers this case, and I find no assistance from the authorities to which we have been referred. In the result, therefore, the appeal must be allowed.

MACKINNON L.J. I agree.

GODDARD L.J. I agree.

Appeal allowed.

Solicitor for company: *Treasury Solicitor.*
Solicitors for plaintiff: *Jaques & Co.*

P. J. B.

Applied. CASSIDY *v.* MINISTRY OF HEALTH [1951] 2 K. B. 343

GOLD *v.* ESSEX COUNTY COUNCIL.

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June 23, 24, 25;
July 15.

Negligence — Hospital — Public hospital — Radiographer — Treatment of patient by Grenz rays—Failure to use proper screen—Injury to patient—Liability of hospital—Damages—Infant plaintiff—Amount of award.

A local authority carrying on a public hospital owes to a patient the duty to nurse and treat him properly, and is liable for the negligence of its servants even though the negligence arises while a servant is engaged on work which involves the exercise of professional skill on his part. Where, therefore, a patient being treated in such a hospital was injured by the negligence of a competent radiographer, who was a whole-time employee of the hospital, the local authority was liable for his negligence.

The same duty and liability is owed by and attaches to the governors of a voluntary hospital, whether the services be rendered gratuitously or for reward, and the observation of Kennedy L.J. in *Hillyer* v. *St. Bartholomew's Hospital* (*Governors*) [1909] 2 K. B. 820, 829, that the only liability of a public hospital giving "the gratuitous benefit of its care" to a patient is that "the patient whilst there shall be treated only by experts, "whether surgeons, physicians or nurses, of whose professional "competence the Governors have taken reasonable care to assure "themselves" and to provide "fit and proper apparatus and "appliances" is a dictum which ought not to be followed. The actual decision in that case (as laid down by Farwell L.J. in his judgment) was that when a nurse in an operating theatre did something by the direction of the operating surgeon which resulted in injury to the patient, the governors were not liable for the act of the nurse.

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In assessing damages in favour of an infant plaintiff a judge should not award a low figure on the ground that the amount, through accumulation of interest, would have increased very considerably by the time the infant became of age and received it. The court may think it right at any moment to apply the money for the benefit of the infant during his minority and it is impossible to estimate the value of money at some date in the future. The infant is, therefore, entitled to have the damages assessed on the basis of an immediate award.

Appeal from Tucker J.

In June and July, 1940, the plaintiff, Ruth Ann Gold, aged five years, was taken by her mother to Oldchurch county hospital, which was maintained by the defendant county council under the Public Health Act, 1936, for treatment for warts on her face. She was seen by the visiting dermatologist, Dr. Burrows, who ordered treatment by 1000 units of Grenz rays and sent the plaintiff to the radiology department with a written statement as to the treatment she was to receive there. The department was in charge of a radiologist, Dr. Allen, but the treatment was given to the plaintiff by a qualified and competent radiographer, named Mead, who was employed by the defendants under a contract of service. While the plaintiff was undergoing the treatment her face was covered with a lead-lined rubber cloth which protected all but the affected part of her face. This happened on about five occasions, the mother paying a fee of 1s. 6*d*. on each visit. As the warts did not yield to this treatment, Dr. Burrows ordered the number of units of Grenz rays to be doubled and on July 11, 1940, the mother again took the plaintiff for treatment. On this occasion, Mead was admittedly negligent in that he covered the plaintiff's face only with a piece of lint. In doing this he was not acting under the instructions of Dr. Allen or any other qualified medical practitioner. As a result the plaintiff's face was permanently disfigured. The plaintiff brought this action by her next friend for damages, alleging that Mead had been negligent in his treatment of her and that the defendants, whose servant or agent he was, were responsible for his negligence. Tucker J. held, on the authority of *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1), that the defendants were not liable for the negligence of Mead, who was a competent and qualified man, but he questioned whether, if the matter had been free from any authority binding on English courts, he might not have followed the opinion expressed by Lord

(1) [1909] 2 K. B. 820.

Alness in *Lavelle* v. *Glasgow Royal Infirmary* (1), and arrived at a different conclusion. He fixed the damages he would have awarded to the plaintiff if liability had been established at 125*l.* and gave as his reason for fixing this low figure that as she was so young the amount would have increased very considerably before she received it. The plaintiff appealed.

Denning K.C. and *Safford* for the plaintiff. As Tucker J. found the radiographer, Mead, to have been negligent, the only question is whether the defendants are responsible for that negligence. Mead was the defendants' servant, and it follows that they are responsible for his negligence in the absence of some rule of law protecting a hospital authority. It is the duty of a hospital authority to take reasonable care in the treatment of patients and the defendants are responsible for the failure of one of their servants to perform the duty arising out of the relationship of hospital and patient without negligence. This duty does not arise out of contract and *Hillyer* v. *Governors of St. Bartholomew's Hospital* (2) errs in this respect. Further, it is said that hospital authorities cannot control skilled persons in their employment, but this is a fallacy. The powers of local authorities in regard to hospitals carried on by them are laid down in the Public Health Act, 1936, ss. 181, 182, 183 and 184. There is no foundation for the contention that a local authority carrying on a hospital without profit is less responsible for the negligence of a servant than a nursing home: see *Mersey Docks Trustees* v. *Gibbs* (3). That the test in regard to the responsibility of the hospital is whether the person who has been negligent is the servant of the hospital was recognized in *Hall* v. *Lees* (4) and that test was applied in *Evans* v. *Liverpool Corporation* (5). In an article in 54 Law Quarterly Review, pp. 553 et seq., Professor Goodhart deals comprehensively with the liabilities of hospitals for the negligence of their nurses or other servants. He points out that Farwell L.J. in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (2) was careful to confine the absence of liability of hospitals for the negligence of their nurses to cases where the nurses were acting on the orders of surgeons or other specialists who were not on the staff of the hospital. Kennedy L.J. used wider language, and he, rather than Farwell L.J.

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(1) 1932 S. C. 245.
(2) [1909] 2 K. B. 820.
(3) (1866) L. R. 1 H. L. 93.
(4) [1904] 2 K. B. 602.
(5) [1906] 1 K. B. 160, 166.

appears to have been largely followed. *Strangways-Lesmere* v. *Clayton* (1), where a hospital was held not to be liable for an injury caused to a patient by the negligence of a nurse in the ordinary course of her duty, was clearly wrong. In *Wardell* v. *Kent County Council* (2) a nurse was held to be in the same position as a workman. In *Dryden* v. *Surrey County Council and Stewart* (3) the surgeon and not the hospital was held liable for a nurse's negligence. In Scotland the observations of Kennedy L.J. in the *Hillyer* case (4) are generally followed; *Lavelle* v. *Glasgow Royal Infirmary* (5); *Reidford* v. *Magistrates of Aberdeen* (6). In Canada—see *Nyberg* v. *Provost Municipal Hospital* (7)—and New Zealand—see *Logan* v. *Waitiki Hospital Board* (8)—the observations of Farwell L.J. in the *Hillyer* case (4) are followed. The limitations imposed by those observations should be applied here. As regards damages the judge misdirected himself when he took into account the probability that the amount given would have appreciated by the time the infant plaintiff would receive it, and he does not seem to have taken into account the pain and suffering she underwent. [They also cited *Lindsey County Council* v. *Marshall* (9); *Clelland* v. *Edward Lloyd, Ld.* (10); *Century Insurance Co.* v. *Northern Ireland Road Transport Board* (11); *Newsholme Bros.* v. *Road Transport and General Insurance Co.* (12); and *Evans* v. *Employers Mutual Insurance Association* (13).]

Montague Berryman for the defendants. A local authority, when giving aid in a hospital, provides doctors, nurses and servants, but it does not hold itself out to be carrying on a business by doing so. In *Evans* v. *Liverpool Corporation* (14) the case was put as it was later in *Hillyer's* case (4), and the corporation were held not liable. Greer L.J. in *Marshall* v. *Lindsey County Council* (15) said that the Court of Appeal was bound by *Hillyer's* case (4), and Lord Hailsham and Lord Sankey in *Lindsey County Council* v. *Marshall* (16) approved of Kennedy L.J.'s judgment therein. English and Scottish courts have both drawn a distinction between a hospital run

(1) [1936] 2 K. B. 11.
(2) [1938] 2 K. B. 768.
(3) [1936] 2 All E. R. 535.
(4) [1909] 2 K. B. 820.
(5) 1932 S. C. 245.
(6) 1933 S. C. 276.
(7) [1927] Can. S. C. R. 226.
(8) [1935] N. Z. L. R. 385.
(9) [1937] A. C. 97.
(10) [1938] 1 K. B. 272.
(11) [1942] A. C. 509.
(12) [1929] 2 K. B. 356.
(13) [1936] 1 K. B. 505.
(14) [1906] 1 K. B. 160.
(15) [1935] 1 K. B. 522.
(16) [1937] A. C. 97, 107, 113.

by a local authority and a hospital run as a business. Here the radiographer, who was held by the judge to be a competent man, was negligent in his own skilled work, and the defendants are not liable. The principles of *Hillyer's* case (1) apply. As regards damages, in so far as Tucker J. reduced the damages because he thought they would accumulate, it cannot be said to be right.

Denning K.C. in reply. In *In re Shoesmith* (2) it was pointed out that the Court of Appeal can refuse to follow an earlier decision of the same court on a point not argued before it.

Cur. adv. vult.

July 15. Their Lordships read the following judgments.

Lord Greene M.R. A small payment was made to the defendants for the treatment given to the plaintiff, but I attach no importance to this, since it would be quite unreasonable to hold that the duty owed to a paying patient in such a hospital as this was greater than that owed to a non-paying patient. The result in the present case must, in my opinion, be the same as it would have been if the treatment had been gratuitous.

On the facts I should have thought it clear on principle that the defendants were liable to the infant plaintiff for the negligence of Mead.

Tucker J., in his careful judgment, reviewed the authorities at length and came to the conclusion that he was bound by the decision in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1) to come to a different conclusion. The only question which we have to consider is whether that decision compels us to decide this appeal in favour of the defendants.

Hillyer's case (1) has had a remarkable history. There can be few cases in the books which have given rise to such a diversity of judicial statement as to the precise nature of the point decided. I do not propose to examine the various, and often conflicting, statements as to what it did decide which are to be found, not only in English reports, but also in Scottish and Dominion reports of cases dealing with the liability of hospitals. Those who are interested in the subject will find the cases collected in an article by Professor Goodhart in 54 Law Quarterly Review, p. 553. It is enough to say that

(1) [1909] 2 K. B. 820. (2) [1938] 2 K. B. 637.

there is not, in my opinion, any authority which prevents this court from examining *Hillyer's* case (1) and forming its own opinion as to what it really did decide. There were two reasoned judgments in the case, those of Farwell L.J. and Kennedy L.J.; Lord Cozens-Hardy M.R. agreed that the appeal should be dismissed for the reasons contained in both judgments. This, as the history of this class of case has proved, is unfortunate since the reasons given in the two judgments differ in important respects. The judgment of Farwell L.J. is based on quite narrow grounds, that of Kennedy L.J. on propositions of a scope far wider than was necessary for the decision of the case. These wider propositions so far as they relate to nurses were said by Lord Dunedin to have been by way of dictum: *Lavelle* v. *Glasgow Royal Infirmary* (2), and in this opinion I respectfully concur. In a case where two members of the court base their judgments, the one on a narrow ground confined to the necessities of the decision and the other on wide propositions which go far beyond those necessities, and the third member of the court expresses his concurrence in the reasoning of both, I think it right to treat the narrower ground as the real ratio decidendi. I, accordingly, look to the judgment of Farwell L.J. to discover what the case lays down as a matter of decision.

The act of negligence complained of took place in the course of an examination in the operating theatre conducted by the consulting surgeon attached to the hospital. There were a number of persons present, including the surgeon, three nurses and two carriers. It was not shown which of the persons present was directly responsible for the act of negligence. Farwell L.J., in the first branch of his judgment, held that, whoever was the individual directly responsible, the hospital authorities could not as a matter of law be liable for the negligence of any of those present. In the second branch of his judgment (1) he held that, even if the hospital authorities were in the circumstances liable in law for negligence on the part of the nurses and carriers, it was not shown that they or any of them were or was responsible for the act of negligence complained of. The facts were consistent with the surgeon having been the responsible party, and for his negligence, at any rate, the hospital authorities were not liable. These two branches of the judgment must, I think, be treated as equally authoritative, although it is interesting

(1) [1909] 2 K. B. 820, 827.

(2) 1931 S. C. (H. L.) 34, 35.

to observe that in a later case Farwell L.J. himself treated the second branch as containing the real reason for his decision: *Smith* v. *Martin* (1). It is the first branch which is pertinent to the present question. The observations of the lord justice are prefaced by the assumption that the nurses and carriers were servants of the hospital authorities "for "general purposes," but he held that they were not so "for "the purposes of operations and examinations by the medical "officers," the reason being that in the operating theatre they cease to be under the orders of the authorities and are under the sole orders of the surgeon. They, accordingly, cease for the time being to be the servants of the hospital. The language of Farwell L.J. makes it clear that he was limiting his decision to the facts of the case before him, and that he was only intending to deal with the position of the hospital authorities in relation to what takes place in the operating theatre, the surgeon's domain. I can find nothing in his judgment to support the view that the authorities of a hospital are not liable for the negligent act of a nurse in the performance of her general duties as a nurse, be they duties requiring professional skill or duties of a purely administrative or domestic nature such as giving a patient his meals. It may well be that the principle which he laid down extends to cases where, outside the operating theatre itself, the nurse is acting under the direct instructions of the surgeon or doctor attending the patient, but, be this as it may, I should myself have thought that the true ground on which the hospital escapes liability for the act of a nurse who, whether in the operating theatre or elsewhere, is acting under the instructions of the surgeon or doctor is, not that pro hac vice she ceases to be the servant of the hospital, but that she is not guilty of negligence if she carries out the orders of the surgeon or doctor, however negligent those orders may be. I can see no reason on principle why, if she negligently carries out an order, the hospital should not be liable. The idea that the same nurse is at one moment a servant of the hospital and at another not is one which, with all respect, I find difficult to understand, but I need not further discuss this matter since the reasoning of Farwell L.J. does not appear to me to extend to such a case as that of Mead, having regard to the nature of his employment and the circumstances in which the infant plaintiff was injured. In doing what he did Mead was acting on his own responsibility

(1) [1911] 2 K. B. 775, 784.

and according to his own judgment. He was in no sense under the orders of any medical man save as to the nature of the treatment and the dose. There is no room in his case for the theory of a transmutation in the nature of the employment such as, in the view of Farwell L.J., takes place in the case of a nurse once the door of the operating theatre has closed.

It is, however, necessary to consider also the observations of Kennedy L.J., more particularly as they have sometimes been regarded as containing the true ground of the decision. I will not quote his language at length. It is, curiously enough, limited to the case of a public hospital giving " the gratuitous "benefit of its care " (1). The only liability undertaken in such a case is, according to his view, that " the patient whilst "there shall be treated only by experts, whether surgeons, "physicians or nurses, of whose professional competence the "governors have taken reasonable care to assure themselves ; "and, further, that those experts shall have at their disposal "for the care and treatment of the patient, fit and proper "apparatus and appliances." So far as this proposition extends beyond the case of surgeons and physicians there is, so far as I have been able to discover, no earlier authority which supports it. *Evans* v. *Liverpool Corporation* (2) referred to by Kennedy L.J., certainly does not do so. In that case the jury had found that there was no negligence on the part of the matron and the nurses. The only question with which Walton J. had to deal was whether the hospital was liable for the proved negligence of the visiting physician and his judgment is confined to that question. On this matter of earlier authority I may refer also to a passage in the speech of Lord Sankey in *Lindsey County Council* v. *Marshall* (3). He mentions *Evans* v. *Liverpool Corporation* (2) ; *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1) and an earlier case of *Hall* v. *Lees* (4), and says that " the law as laid down in those "cases" was correctly summed up as follows : "In the case "of a nursing home conducted by local authorities, the local "authority is not responsible for negligence of doctors, matron "or nurses while acting in the exercise of their professional "functions and knowledge." I have already pointed out that *Evans* v. *Liverpool Corporation* (2) is no anthority for such a proposition in so far as it extends beyond the case of doctors.

(1) [1909] 2 K. B. 820, 829.
(2) [1906] 1 K. B. 160.
(3) [1937] A. C. 97, 113.
(4) [1904] 2 K. B. 602.

Nor does *Hall* v. *Lees* (1) give any support to it. In *Hall* v. *Lees* (1) a nursing association provided a nurse for a private patient, and on the true interpretation of the contract it was held that the association did not undertake to nurse the patient but only to procure for her duly qualified nurses. The contract was a special one and the case has nothing to do with hospitals or nursing homes. The only authority for the proposition as stated by Lord Sankey, in so far as it extends beyond doctors and surgeons, is to be found in *Hillyer's* case itself, and there, if my interpretation of that case is correct, only in the dicta of Kennedy L.J.

It appears, therefore, that the supposed limitation on the liability of hospitals in respect of members of their staff (other than doctors and surgeons) when not acting under the direct instructions of doctors or surgeons owes its origin entirely to the views expressed by Kennedy L.J. in *Hillyer's* case (2) with such support as is to be gathered from the concurrence of Lord Cozens-Hardy M.R. There is, so far as I am aware, no English authority which prevents this court from giving effect to its own opinion on the question which arises in the present case.

Apart from any express term governing the relationship of the parties, the extent of the obligation which one person assumes towards another is to be inferred from the circumstances of the case. This is true whether the relationship be contractual (as in the case of a nursing home conducted for profit) or non-contractual (as in the case of a hospital which gives free treatment). In the former case there is, of course, a remedy in contract, while in the latter the only remedy is in tort, but in each case the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf, and this is equally true whether or not the obligation involves the use of skill. It is also true that, if the obligation is undertaken by a corporation, or a body of trustees or governors, they cannot escape liability for its breach, any more than can an individual, and it is no answer to say that the obligation is one which on the face of it they could never perform themselves. Nor can it make any difference that the obligation

(1) [1904] 2 K. B. 602. (2) [1909] 2 K. B. 820, 829.

is assumed gratuitously by a person, body or corporation which does not act for profit: *Mersey Docks Trustees* v. *Gibbs* (1). Once the extent of the obligation is determined the ordinary principles of liability for the acts of servants or agents must be applied.

The question which presents itself in the present case may, therefore, be formulated as follows: When a patient seeking free advice and treatment such as that given to the infant plaintiff knocks at the door of the defendant's hospital, what is he entitled to expect? He will find an organization which comprises consulting physicians and surgeons, presumably also house physicians and surgeons, a staff of nurses, equipment for administering Grenz ray treatment and a radiographer, Mead, employed to give that treatment. So far as consulting physicians and surgeons are concerned, clearly the nature of their work and the relationship in which they stand to the defendants precludes the drawing of an inference that the defendants undertake responsibility for their negligent acts. The same may be true of the house physicians and surgeons, but their case is not relevant to the present inquiry and I say nothing about it. The position of the nurses again, although, no doubt, analogous, is not strictly relevant, but if the nature of their employment, both as to its terms and as to the work performed, is what it usually is in such institutions I cannot myself see any sufficient ground for saying that the defendants do not undertake towards the patient the obligation of nursing him as distinct from the obligation of providing a skilful nurse. Nursing, it appears to me, is just what the patient is entitled to expect from the institution and the relationship of the nurses to the institution supports the inference that they are engaged to nurse the patients. In the case of a nursing home conducted for profit, a patient would be surprised to be told that the home does not undertake to nurse him. In the case of a voluntary hospital with the usual nursing staff his just expectation would surely be the same. The idea that in the case of a voluntary hospital the only obligation which the hospital undertakes to perform by its nursing staff is not the essential work of nursing but only so-called administrative work appears to me, with all respect to those who have thought otherwise, not merely unworkable in practice but contrary to the plain sense of the position. If correct, it would mean that a hospital undertakes to carry up the patient's tea by its nurses and is liable if a nurse negligently spills the hot water on the patient, but that the true function of a nurse, namely, that of nursing, is not one which the nurse is employed to perform on behalf of the hospital. A nurse, I should have thought, is employed by a hospital to nurse the patients, not merely to carry up their tea, and a patient would expect that the hospital employed a nurse to nurse him. The other duties which the nurse has to perform are incidental to her primary task of nursing, and could as well be performed by anyone else. Even Farwell L.J. in *Hillyer's* case (1) does not say that the hospital does not undertake to nurse, but only that it does not undertake to nurse during the operation (2). I have only dealt with the case of nurses because in the authorities which I have discussed nurses are taken as the type of skilled person on the hospital staff other than medical men. In the case of the defendants' hospital, the patient seeking treatment by Grenz rays finds a department equipped with suitable apparatus and a whole-time employee engaged to give the treatment. In the circumstances I can draw no other inference than that the obligation assumed is to treat the patient by the hand of Mead with the apparatus provided. This result appears to me to follow necessarily when all the relevant circumstances are considered. It is the natural and reasonable inference to be drawn from the defendant's method of conducting their affairs and the nature of Mead's engagement. The obligation to be ascribed to them must be measured accordingly.

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(1) L. R. 1 H. L. 93.

I have not so far referred to the statutory powers under which the defendants maintain their hospital. The nature of those powers is one of the relevant circumstances to be considered in determining the extent of their obligation. Indeed, it might well be regarded as conclusive, but I prefer not to rest my judgment on so narrow a ground. Nevertheless, the inference which I draw from the other circumstances of the case is, I think, confirmed when the statutory powers are examined. They are to be found in Part VI. of the Public Health Act, 1936. Section 181 empowers a county council or local authority to "provide hospital accommodation for "persons in their county or district who are sick." This power includes power to provide clinics, dispensaries and out-patient departments. Under these powers it was clearly competent to the defendants to provide an X-ray department, properly equipped and staffed. Under s. 184 the county council or local authority are in infectious cases empowered, and in non-infectious cases directed, to recover the expenses of maintenance from the patient, and by sub-s. 2 (*b*) the expenses are to be calculated by reference to the average cost per patient of "the maintenance of the institution and "the staff thereof and the maintenance and treatment of the "patients therein." It is clear, therefore, that the powers of the defendants include the power of treating patients, and that they are entitled, and, indeed, bound in a proper case, to recover the just expense of doing so. If they exercise that power, the obligation which they undertake is an obligation to treat, and they are liable if the persons employed by them to perform the obligation on their behalf act without due care. I am unable to see how a body invested with such a power and to all appearance exercising it, can be said to be assuming no greater obligation than to provide a skilled person and proper appliances.

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(1) [1909] 2 K. B. 820.

(2) Ibid. 826.

My conclusion, therefore, is that the liability of the defendants is established. The learned judge fixed the damages which he would have awarded to the infant plaintiff if liability had been established at 125*l*. This assessment, although not binding on us, is one from which, but for one circumstance, I would have been unwilling to differ, particularly as Tucker J. saw the nature of the disfigurement. He described it as "very unpleasant" and it will last all the child's life, but he fixed the damages at a low figure because she was only five years old and the amount would have increased very considerably by the time she got it. In my opinion Tucker J. was wrong in giving such weight to the possibility of an increase. It is not the least certain that the money will not be required at any moment, sooner or later, for the benefit of the infant plaintiff, and she is entitled to have the damage assessed on the basis of an immediate award and not on the basis of an award to be received at some future date after an assumed accumulation of interest has taken place. In the circumstances, I think that a proper sum to award is 300*l*.

MACKINNON L.J. Apart from authority, I should think the legal principles to be applied were as follows: (1.) One who employs a servant is liable to another person if the servant does an act within the scope of his employment so negligently as to injure that other. This is the rule of respondeat superior. (2.) That principle applies even though the work which the servant is employed to do is of a skilful or technical character as to the method of performing which the employer is himself ignorant, for example, a shipowner and the certified captain who navigates his ship. (3.) The liability of the master for the negligent act of the servant will exist although at the time the servant is, by direction of the master or by operation of law, under the control of some third party, for example, when the captain of a ship is under the command of a naval commodore in charge of a convoy. (4.) The master will not be liable for the act of his servant if he is only doing, without personal negligence, that which he is directed to do by such third party. An example is when a captain by command of the commodore goes at eight knots in a dense fog. His employer is not liable for a resulting collision, since the servant is not negligent, and if anyone is negligent it is the commodore for whose acts the shipowner is not liable.

Applying these principles to this case, I should hold that Mead was clearly the servant of the defendants, and that when applying the Grenz rays to the plaintiff he was acting for them in the scope of his employment. Under the second proposition he would render the defendants liable for his negligence in that task although his work involved the exercise of skill on his part. Under the third proposition they would still be liable if he did the work negligently, although he was at the time doing it by the orders of Dr. Burrows. But under the fourth proposition, if he was only doing what Dr. Burrows told him to do, and as he told him to do it, the defendants would not be liable. For Mead would not be negligent, while Dr. Burrows would. The plaintiff could then only recover if Dr. Burrows was the servant of the defendants.

But the difficulty of deciding this case in that way, and by the application of those principles, arises from the existence of *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1) and especially the dicta in it and in other cases in which it has been followed or referred to. The claim of the plaintiff in that case was for injury alleged to have been caused to him by the negligence of servants of the defendants. The injury was sustained when he was undergoing an exploratory operation under an anæsthetic in the operating theatre. The persons from

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(1) [1909] 2 K. B. 820.

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whose acts or omissions he had suffered injury were those who were in the theatre, and they were three surgeons and certain nurses. The plaintiff, to succeed, had to establish that negligence had been committed by one or more person or persons who were servants of the defendants. The senior surgeon in charge certainly was not a servant of the defendants, and probably the other two surgeons were not servants of the defendants. The nurses, I should think, were undoubtedly servants of the defendants, although they were at the time acting under the directions and control of the surgeon. If in carrying out his directions a nurse, or the nurses, only did what the surgeon told them to do, I should think the defendants would not be liable, by reason of my fourth proposition, but if a nurse or nurses, in carrying out his directions, did so negligently, then I should think that the defendants would be liable, in accordance with my third proposition.

It would have been sufficient for the decision of *Hillyer's* case (1) to hold that the plaintiff had not proved that he sustained his injury by reason of the negligent act or omission of a servant or servants of the defendants. To do so he must prove that it was the act or omission of the nurse or nurses since the surgeons were not servants of the defendants. Farwell L.J. in *Smith* v. *Martin* (2) explained the decision in *Hillyer's* case (1) as resting on the plaintiff's failure to discharge this onus of proof. For he said (3) that " in *Hillyer's* case (1) "the nurses . . . . were treated as being servants for whose "acts the hospital would be liable, but the plaintiff failed to "prove any case against them." If this were a correct summary of the reasons given in the judgments, I should find in *Hillyer's* case (1) no obstacle in the way of my deciding the present case in favour of the plaintiff, for in this case I could equally treat Mead as a servant for whose acts the hospital was liable, and the plaintiff has succeeded in proving a case of negligence against him. But Farwell L.J.'s summary in *Smith* v. *Martin* (4) is clearly not a correct summary of his own reasoned judgment in *Hillyer's* case (1) ; still less is it of that of Kennedy L.J. The reasoning of Farwell L.J., and that of Kennedy L.J. are, to a large extent, at variance one with the other. The reasoning of Farwell L.J. is that when the nurses enter the operating theatre and within it come

(1) [1909] 2 K. B. 820.
(2) [1911] 2 K. B. 775.
(3) [1911] 2 K. B. 784.
(4) Ibid. 775, 784.

under the control and direction of the surgeon they cease to be the servants of the hospital because they "are at the "disposal of and under the sole orders of the operating surgeon "until the whole operation has been completely finished; "the surgeon is for the time being supreme, and the defendants "cannot interfere with or gainsay his orders." I confess that with all deference this proposition, so stated, seems to me no more accurate than to say, in the case I suggested, that the captain of a ship ceases to be the servant of the shipowner when that captain comes under the orders of the commodore of a convoy. The true proposition, as I think, would be that although the nurses remained the servants of the hospital in the operating theatre, the hospital would not be liable for their acts if they were only doing, without personal negligence, what the surgeon directed them to do. The reasons given by Kennedy L.J. for deciding in favour of the defendants are quite different from those of Farwell L.J., and very much wider in scope. In his view the hospital only undertakes towards its patients the obligation to provide premises where they will be treated by experts, and those experts are (1) "surgeons, physicians, or nurses, of whose professional "competence the governors have taken reasonable care to "assure themselves . . . . But I see no ground for holding ". . . . that the hospital authority makes itself liable in "damages if members of its professional staff . . . . act "negligently towards the patient in some matter of professional "care or skill." This is to assimilate the position of a nurse to that of the senior consultant surgeon. He is clearly not a servant of the managers of the hospital, and equally a nurse is not their servant. It is true that the lord justice goes on to say that the hospital authority may be "legally responsible "to the patients for the due performance of their servants "within the hospital of their purely ministerial or administrative duties." He adds, as examples of "purely ministerial "or administrative duties," "attendances of nurses in the "wards" and "the summoning of medical aid in cases of "emergency," which seems to recognize the nurses as being "servants" for such duties, while it is difficult to see why these are not "matters of professional care or skill." *Hillyer's* case (1) was mentioned in the House of Lords in *Lindsey County Council* v. *Marshall* (2). It was not necessary for the House to consider its correctness, and it did not do so. Lord

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(1) [1909] 2 K. B. 820, 826.

(2) [1937] A. C. 97.

Wright in terms said (1): "It is not necessary to express "here any opinion one way or the other about the correctness "of that decision."

In these circumstances, the question that seems to face me is whether I am bound by *Hillyer's* case (2) to dismiss the present appeal. It has been pointed out by Greer L.J. that this court is not bound to follow one of its previous decisions although it almost always does so. *Hillyer's* case (2) is, as I have pointed out, a rather singular one. According to Farwell L.J., in his explanation of it in *Smith* v. *Martin* (3), it decided nothing except that the plaintiff had failed to prove the cause of action he might have had. And the cause of action he specified was clearly the cause of action the present plaintiff possesses and has proved. As I have said, if that were the correct summary of what *Hillyer's* case (3) decided, it becomes almost an authority for allowing the present appeal. Secondly, the reasoning of the judgment of Farwell L.J., that the nurses ceased to be servants of the hospital when inside the operating theatre under the control of the surgeon is no obstacle to the success of the present plaintiff. Mead was not doing anything in any apartment under the control or orders of Dr. Burrows. There is no ground, on the reasoning of Farwell L.J., to say that he had ceased to be the servant of the defendants. Thirdly, the reasoning of Kennedy L.J. not only differs from that of Farwell L.J., but is really inconsistent with it. According to him nurses are professional experts, just as much as is the hospital's senior surgeon, and are, no more than he is, "servants" of the hospital, although they may be "servants" for what are called "purely ministerial or administrative "duties." I confess I really do not know whether Kennedy L.J. would consider that Mead's work in the present case, in treating the plaintiff with Grenz rays, was the work of a professional expert, akin to a physician or surgeon, or a purely administrative or ministerial duty of a servant of the hospital.

Having regard to these considerations, I do not think I am bound to dismiss this appeal by reason of the existence of *Hillyer's* case (2). I think I am justified in treating it as having only decided in reality that which Farwell L.J. said it did in *Smith* v. *Martin* (1) and in regarding the divergent

(1) [1937] A. C. 97, 124.
(2) [1909] 2 K. B. 820.
(3) [1911] 2 K. B. 775.

reasons of the two lords justices as obiter dicta. In the result, for the reasons indicated in the first part of my judgment, I am for allowing the appeal, and entering judgment for the plaintiff. As to the damages, I agree that they should be increased to 300*l.*

GODDARD L.J. Assuming that the defendants had taken reasonable care in appointing Mead to do this work with Grenz rays, the question is whether we are obliged by the decision in *Hillyer's* case (1) to hold that they had discharged the duty which they owed to the plaintiff. In my opinion, it would be possible on a narrow view to distinguish that case from the one we have now to decide. That was a case of a voluntary hospital, and although, since *Mersey Docks Trustees* v. *Gibbs* (2), it makes no difference to liability whether the party sought to be made responsible was reaping a benefit or acting gratuitously, this is a case of a hospital being set up, maintained and conducted under the provisions of a statute, and the duties and obligations of the defendants must be ascertained by reference to the Public Health Act, 1936. By s. 181 the defendants are authorized to provide hospital accommodation for persons in their district who are sick. By s. 184 they are to recover the expense of this maintenance from patients who are able to pay, and that is to be a sum representing the average daily cost per patient of the maintenance of the institution and the staff and the maintenance and treatment of the patient therein. The right of a resident in the district who is sick to enter the hospital and the right of the defendants to recover the cost of his maintenance and treatment are both independent of contract, and, therefore, so is the duty owed by the defendants to the patient. Nor does the duty depend on any profession by the defendants. It depends on what it is their duty to do once they have availed themselves of the permission to set up a hospital which the statute gives them. Their duty would seem to be to maintain and treat the sick in their hospital, and that appears to me to oblige the defendants, not merely to provide a nurse and treatment, but to provide nursing, which they do and can only do by their servants. If there is negligent nursing I can see no ground on which they can say that they have discharged the duty cast on them.

I should, however, be sorry to decide this case on so narrow

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(1) [1909] 2 K. B. 820. (2) L R. 1 H. L. 93.

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a ground. It would be lamentable were it to be said that there is one standard for council hospitals and another for voluntary hospitals. Since the *Mersey Docks* case (1), whether the service is rendered gratuitously or for reward is immaterial, but if *Hillyer's* case (2) goes to the length of deciding what in subsequent cases, at least in courts of first instance, it has been assumed is its result, it must apply to the paying wards of hospitals, and, indeed, to all descriptions of private nursing homes some of which are owned by limited companies. It is necessary, therefore, to examine *Hillyer's* case (2) critically. The first observation I would make is that the court found that no negligence had been proved against anyone, but undoubtedly both Farwell L.J. and Kennedy L.J. discussed the case from the point of view of what the legal position would have been had negligence been proved. So far as the surgeon was concerned, no one would question the decision. Visiting surgeons and physicians are not the servants of the hospital governors, whether the latter are the board of a voluntary institution or a local authority. Even if, as I think is the case with council hospitals, they receive a fee, their contract is to give services. It is not a contract of service. But again, no one can seriously dispute that there is a contract of service in the case of nurses and people who are engaged on such terms as Mead is in the present case. Farwell L.J. assumed that the nurses were the servants of the governors. I think all he intended as regards nurses was that, once they were in the operating theatre, they were necessarily under the control and orders of the surgeon, so that, if they carried out his orders, they were not guilty of negligence. So far, we may agree. It is part of the nurses' duty, as servants of the hospital, to attend the surgeons and physicians and carry out their orders. If the surgeon gives a direction to the nurse and she carries it out, she is not guilty of negligence even if the direction is improper. I do not think the lord justice was contemplating a case where the surgeon or physician gives a proper order and the nurse is guilty of negligence in performing it, which may take place either in the theatre or at the bedside. So, indeed, it may take place when the surgeon or physician is no longer actually present. It is the nurse's duty to her employers and to her patient to carry out the directions given by the surgeon or physician faithfully and carefully. That this was what Farwell L.J. had in mind is, I think,

(1) L. R. 1 H. L. 93.

(2) [1909] 2 K. B. 820.

shown by his comment on *Hillyer's* case (1) in *Smith* v. *Martin* (2) only two years later. He said the nurses were treated as being servants for whose acts the hospital would be liable, but no case was proved against them. In my opinion, there is nothing in his judgment which obliges us to hold that, when a nurse negligently carries out instructions given to her, her employers are not liable for her acts. The only other comment I would make on his judgment is that he uses language which might be taken to mean that, in his opinion, in the operating theatre or, I suppose, in the ward where she was acting under the personal supervision of the physician or surgeon, the nurse is his servant and, for the time, not the servant of the governors. That would lose sight of the fact that by the terms of her employment as a nurse at a hospital she is and must be required to attend on the medical and surgical staff and carry out their directions. It is not a case of a servant being lent by his employer and placed wholly, though temporarily, in the service of another, as, for instance, in *Donovan* v. *Laing, Wharton and Down Construction Syndicate, Ld.* (3), and *Bain* v. *Central Vermont Railway Co.* (4). That he did not intend his language to be so understood is, I think, shown by his comment in *Smith* v. *Martin* (2), to which I have referred. His judgment, therefore, in my opinion, is no authority for the proposition that the governing body of a hospital are not liable for the negligence of a servant acting within the scope of his authority, although the negligent act arose during the exercise of the professional skill for which the servant was employed.

The judgment of Kennedy L.J. presents greater difficulty, and Lord Cozens-Hardy M.R. stated that he concurred with it as he did with that of Farwell L.J. He places nurses in exactly the same position for this purpose, vis-a-vis a governing body, as surgeons, in spite of the fact that the former are under a contract of service and the latter are not. If his judgment is to be taken without any qualification it seems that the doctrine of respondeat superior does not apply to nurses and hospital authorities. His reasoning is well summed up by Horridge J. in *Strangways-Lesmere* v. *Clayton* (5) when he said: "I do not think the hospital authorities undertook "in any way themselves to administer the doses, but that the "nurses in doing that were doing their own work as skilled

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(1) [1909] 2 K. B. 820.
(2) [1911] 2 K. B. 775.
(3) [1893] 1 K. B. 629.
(4) [1921] 2 A. C. 412.
(5) [1936] 2 K. B. 11, 15.

"nurses and not as servants of the hospital authorities." In other words, as the alleged superior did not himself profess to exercise the particular skill he could not be answerable for the negligence of the person whom he employed to exercise it. But the question is not: Does the alleged superior promise or profess to do something himself? but: What is it that he promises or professes to do? I use the word "promise" as applicable to cases where the duty is alleged to arise ex contractu and "profess" to those in which the duty arises independently of contract. If he does that which he promises or professes by a servant or agent, he is liable for their acts on the doctrine of respondeat superior. Otherwise it is difficult to see how any corporate body could ever be liable for the acts of their servants. This part of the judgment has been referred to by Lord Dunedin in *Lavelle* v. *Glasgow Royal Infirmary* (1) as dicta, and, in truth, it was not necessary for the decision in that case as no negligence was proved against the nurses. Nor is it supported by *Evans* v. *Liverpool Corporation* (2), to which the learned lord justice referred. All that case decided was that the visiting medical officer of a hospital was not the servant of the hospital authority. *Hall* v. *Lees* (3) was a case which related to nurses but decided quite a different point. It was an action against a nursing association who supplied nurses for nursing private patients and their prospectus showed that the nurse was to be regarded as the servant of the employer. The difference in reasoning between Farwell L.J. and Kennedy L.J. makes it difficult to say what the ratio decidendi of *Hillyer's* case (4) is, nor has this been elucidated by the many comments on that decision in subsequent cases. Its correctness has been expressly left open by the House of Lords in *Lindsey County Council* v. *Marshall* (5) where the decision turned on a different point.

For my part, considering that neither lord justice indicated any difference of opinion with the other and that the Master of the Rolls agreed with both, I think we are entitled to choose between the two judgments, and I prefer that of Farwell L.J., although, if he meant that the nurse is the temporary servant of the doctor, I do not agree with him. I cannot understand on what principle a hospital authority is to be exempt from liability if a nurse carelessly administers a dose of poison to a patient instead of medicine, and yet is liable if the cook mixes some deleterious substance in the patient's food. Hospital managers, be they local authorities or governors of voluntary institutions, nowadays have in their service many specialists—solicitors, accountants, engineers, electricians and the like. I can see no sound reason why they should be responsible for the acts of these servants and not for those of nurses who are equally in their service. That they are not liable for the doctor's negligence is due simply and solely to the fact that he is not their servant. I desire, however, to say that for the purpose of this judgment I am not considering the case of doctors on the permanent staff of the hospital. Whether the authority would be liable for their negligence depends, in my opinion, on whether there is a contract of service and that must depend on the facts of any particular case. So, too, I can conceive that a nurse might be regarded as negligent even though she was carrying out the orders of the doctor. If a doctor in a moment of carelessness, perhaps by the use of a wrong symbol in a prescription, ordered a dose which to an experienced ward sister was obviously incorrect and dangerous, I think it might well be held to be negligence if she administered it without obtaining confirmation from the doctor or higher authority. In the stress of an operation, however, I should suppose that the first thing required of a nurse would be an unhesitating obedience to the orders of the surgeon. In my opinion, therefore, the defendants are liable for the negligence of Mead, who is, for this purpose, in exactly the same position as a nurse, and I would allow the appeal.

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(1) 1931 S. C. (H. L.) 34.
(2) [1906] 1 K. B. 160.
(3) [1904] 2 K. B. 602.
(4) [1909] 2 K. B. 820.
(5) [1937] A. C. 97.

With regard to the damages, I think the learned judge was in error in taking into account that the sum he awarded would be largely increased by the time the child came of age. We cannot speculate on what the value of money will then be, and in any case the court has power to allow the damages to be applied for the benefit of the infant during her minority. I agree to increasing the amount, and I think the proper sum would be 300*l*.

Appeal allowed.

Solicitor for plaintiff: *Sidney Samson.*

Solicitors for defendants: *Sharpe, Pritchard & Co., for J. E. Lightburn, Chelmsford.*

H. C. G.

1942
July 1.

CONNAUGHT PROPERTIES, LIMITED *v.* REGIONAL PROPERTIES, LIMITED.

Damages—Measure—Contract—Plaintiff company to manage defendant company for ten years—Provision for determination of contract by defendants, if L. ceased to be director of plaintiffs—Wrongful repudiation of contract by defendants—Subsequent cessation of L. to be director—Contract not then terminated by defendants.

By a contract in writing dated April 8, 1937, the defendant company appointed the plaintiff company and the plaintiff company agreed to act as managing agent, secretary and registrar for the defendant company for a period of ten years from March 31, 1937, for a stipulated remuneration. It was provided by para. 8 of the contract that the defendants should have the right to terminate the contract in the event of one Ley, who was chairman of the board of directors of both the plaintiff and the defendant companies, ceasing to be a director of the plaintiffs for any reason other than death. On September 12, 1940, the defendant company wrongfully repudiated and determined the contract, and on September 18, 1940, the plaintiff company brought an action against the defendant company claiming damages for breach of contract. On March 20, 1941, Ley ceased to be a director of the plaintiff company for a reason other than death. The defendant company then gave no notice to terminate the contract. In the action, on the issue of the assessment of damages, the plaintiff accepted the position that some allowance should be made in respect of the possibility arising of a right of the defendant company to determine the contract before the expiration of the ten years:—

Held, that, in assessing the damages account had to be taken of the fact that the defendant company had not exercised their right to terminate the contract under para. 8 and therefore the damages were not limited to those incurred between the date of the breach, September 12, 1940, and March 20, 1941, when the defendants could have so terminated the contract.

ACTION tried by Croom-Johnson J.

The facts appear in the headnote. On June 8, 1942, Croom-Johnson J. found that on September 12, 1940, the defendant company in breach of the contract of April 8, 1937, repudiated and terminated it, and he referred the assessment of damages for the breach to a special referee under s. 88 of the Supreme Court of Judicature (Consolidation) Act, 1925. Before the special referee counsel for the defendants contended that the damages for the breach of contract on September 12, 1940, must be limited to those incurred from that date to March 20, 1941, when Ley ceased to be a director of the

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Reported by G. C. Moran, Esq., Barrister-at-Law.

plaintiff company. The special referee in his report to the court dated June 29, 1942, assessed the damages at 10,640*l.*, and it was agreed between the parties that in thus assessing the damages he had not limited them to those incurred between September 12, 1940, and March 20, 1941, but that he had taken into account the possibility that the contract might be terminated before the expiration of the ten years. The defendants now moved the court under R.S.C., O. XXXVI., r. 54, to remit the report to the special referee for further consideration, and the plaintiffs moved the court to adopt that report.

H. G. Robertson (*Sellers K.C.* with him) for the defendant company. When there are several ways in which a contract may be performed, damages for its breach must be assessed in the way least profitable to the plaintiff and least burthensome to the defendant (1). A plaintiff is only entitled to recover as damages that sum to which he is absolutely entitled under his contract. If a defendant agrees to sell a plaintiff a hundred tons of coal, ten per cent. margin on either side at the defendant's option, and the defendant makes no delivery, the damages which the plaintiff can recover are those for failure to deliver ninety tons of coal. The same rule has been often applied in the case of a lease for twenty-one years, terminable by either party at the end of seven or fourteen years. Again, if a defendant has engaged a servant for a period of seven years with the option to determine the employment at the end of the third year and the defendant wrongfully dismisses the servant at the end of six months, the servant can only recover damages for the loss of two and a half years' service. The contract of April 8, 1937, was determinable by the defendant company in a certain event which happened on March 20, 1941. The plaintiffs, therefore, can only recover damages from the date of the breach, September 12, 1940, to March 20, 1941, when the defendants could have terminated the contract. [CROOM-JOHNSON J. In assessing these damages the court must look at the facts as known at the time of the assessment. The defendants are seeking to rely on the fact that Ley ceased to be a director of the plaintiffs on March 20, 1941, but they seek to ignore the fact that they did not then terminate the contract.] The defendants had already determined the contract in the preceding September and there was no reason for them again to determine it.

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(1) See the observations of Maule J. in *Cockburn* v. *Alexander* (1848) 6 C. B. 814 and of Scrutton L.J. in *Withers* v. *General Theatre Corporation* [1933] 2 K. B. 548.

Harman K.C. and *Quass* for the plaintiff were not called on to argue.

CROOM-JOHNSON J. In my opinion, the decision of the special referee was right. The defendants, although they had repudiated this contract on September 12, 1940, claiming that they were justified in doing so, could, on Thomas John Ley ceasing to be a director of the plaintiff company, have given notice that they terminated the contract reserving their rights to justify their earlier termination of the contract by repudiation, but they did not do so. On assessing damages, when taking into account events which have happened after the date of the breach, the court must take into consideration all the relevant facts which have occurred since the date of the breach, and in the present case one of these facts is that the defendants did not terminate the contract when Ley ceased to be a director. Mr. Robertson has put forward various analogies. If a lessor wrongfully ejects his lessee from possession, the fact that he had the right to terminate the lease at a certain period does not seem to me to limit the damages of the lessee from the time of dispossession to the time when the lessor could have terminated the lease if the lessor did not do so. It is conceded here that in assessing damages the special referee took into account the possibility that the contract of April 8, 1937, might be terminated before the expiration of the ten years provided for in the contract, and, accordingly, on that ground made some reduction in his assessment. In view of the possibility of an appeal, the parties have accepted a suggestion of mine that I should ask the special referee to state what difference it would make in his assessment of the damages if he had accepted the contention of Mr. Robertson, which both the special referee and I have rejected. I adopt the report of the special referee, and give judgment for the plaintiffs for 10,640*l.*, with costs.

Judgment accordingly.

Solicitors for plaintiffs: *P. H. Brashier & Co.*
Solicitors for defendants: *Hyman Isaacs, Lewis and Mills.*

J. LYONS AND COMPANY, LIMITED *v.* KNOWLES.

1942
July 3, 27.

Landlord and tenant—Lease—Assignment—Covenants by successive assignees directly with lessor to pay rent for residue of term—Failure of assignee in possession to pay rent — Liability of first assignee for arrears.

A lease of premises granted by the lessors contained covenants by the lessee not to assign without the lessors' written consent and also that every assignment should contain a covenant by the assignee directly with the lessors to observe and perform the covenants and conditions reserved and contained in the lease and not further to assign without the lessors' consent and in case of an assignment to pay the several rents reserved. The lessee, with the lessors' licence, assigned to the defendant, who later re-assigned to a company. The deed of licence, to which the lessors were parties, contained a covenant by the defendant that he would, during the residue of the term granted by the lease, pay the rent reserved and observe the covenants and conditions on the part of the lessee contained in the lease. The deed under which the defendant assigned to the company contained a like covenant by the company. The company failed to pay the rent. In an action by the lessors to recover the arrears of rent from the defendant:—

Held, that each and every successive assign was bound to pay the rent and observe and perform the covenants in the lease for the whole residue of the term granted by the lease.

ACTION tried before Asquith J., without a jury.

By an indenture dated January 15, 1924, the lessors, Joseph Lyons & Co., Ld., leased premises known as Nos. 18, 19, 20 and 21 Jermyn Street, Westminster, to one Willcox, for a term expiring in March, 1976. The lessee covenanted, by para. (*p*), "not to assign, transfer, underlet or part with "the possession of the said demised premises or any part "thereof without the previous consent in writing of the lessor "first had and obtained . . . . but so that such consent shall "not be unreasonably withheld to any assignment or under-"letting to a respectable and responsible person, and every "assignment or under-lease or tenancy agreement shall "contain a covenant by the assignee, under-lessee or tenant, as "the case may be, directly with the lessor, to observe and "perform the covenants and conditions reserved by and "contained in these presents, including a covenant not to "further assign or under-let or part with the possession of "the said premises or any part thereof without such consent "as aforesaid, and in case of an assignment to pay the several "rents and sums of money hereby reserved." By a deed of licence dated May 28, 1924, the lessors consented to the assignment of the premises by Willcox to the defendant, Knowles, for the residue of the term granted by the lease. The deed contained the following paragraph: "(3.) The "assignee hereby covenants with the lessor that he will henceforth during the residue of the term granted by the lease "pay the rent thereby reserved and observe and perform the "covenants and conditions on the part of the lessee therein "contained and in particular will not at any time after the "completion of the said assignment transfer or under-let or "part with the possession of the demised premises or any part "thereof without the consent in writing of the lessor for that "purpose first had and obtained." On March 21, 1928, the defendant, by licence of the lessors, assigned the residue of the term granted by the lease to Gordon Chambers Co., Ld. The deed of licence was mutatis mutandis in identical terms with that of May 28, 1924. Gordon Chambers Co., Ld., having defaulted, the lessors claimed from the defendant arrears of rent and insurance premiums, amounting to 1755*l.* 13*s.*

Wynn Parry K.C. and *F. W. Wallace* for the plaintiffs.

Denning K.C. and *Crispin* (for *H. C. Leon*, on war service) for the defendant.

Cur. adv. vult.

Asquith J. read the following judgment: The case raises an interesting and novel point of law. At common law an assign of a lease who re-assigns is discharged from liability in respect of any defaults which occur after the period during which he was an assign. The defendant, therefore, is prima facie immune, and cannot be held liable to pay the sums in respect of which the Gordon Chambers Company has defaulted. If he is to be held liable it must be by virtue of some term, express or implied, in one or more of the various instruments involved. These are three—first, the lease; secondly, the deed by which Willcox assigned to the defendant; and, thirdly, the deed by which the defendant assigned to the Gordon Chambers Company. The lessors were parties not only to the lease, but to the two last-mentioned deeds, which were tripartite instruments.

Before considering their terms or tenor I will refer to one point only to clear it out of the way. It concerns the position of an assign who has not re-assigned. It appears from the authorities that where rent is accepted by a landlord from an assignee in circumstances which imply that the landlord looks to the assignee for fulfilment of the terms of the lease, then the assignor will be discharged if the obligation to pay rent depends merely on the reddendum. Where, however, as in the present case, there is, in addition, an express covenant to pay rent, the assignor will not be discharged merely by reason of the landlord's acceptance of rent from the assignee. This appears to result from *Walker's* case (1) and *Thursby* v. *Plant* (2), and the reason for the rule is given in *Auriol* v. *Mills* (3). This point, though dwelt on at some length, appears to be academic in the circumstances of the present case.

[His Lordship read para. (*p*) of the lease and para. (3) of the deeds of assignment of May 28, 1924, and March 21, 1928, and continued :] It will be observed that the licence under which Willcox assigned to the defendant provides expressly that the defendant will henceforth, during the residue of the term granted by the lease, pay the rent reserved. The plaintiffs argue that this means precisely what it says and that the defendant was covenanting to remain liable for the rent, etc., for the whole residue of the lease, whether he re-assigned the term or not, and not merely for such part of that residue during which his own interest as an assignee should continue. The defendant, on the other hand, relies on the existence of an exactly similar covenant in the licence whereunder subsequently he assigned to the Gordon Chambers Company as impliedly releasing him as from the moment of the second assignment. The company engages to pay the rent for the residue of the term granted by the lease. The inference which the defendant contends ought to be drawn from this is that the second licence amounts to a novation, and that it impliedly substitutes the liability of the company for that of the defendant, and impliedly absolves the defendant as from the date of the re-assignment.

There would appear to be no authority in the law of landlord and tenant which decides the rights of the parties in a case of this sort, and counsel were thrown back on general principle and analogy. Mr. Denning, for the defendant, submitted as a general proposition that when property which carries with

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(1) (1587) 3 Co. Rep. 22a.

(2) (1669) 1 Wms. Saund. 230 (*b*), 240 (*a*).

(3) (1790) 4 Term Rep. 94, 98.

1942

LYONS (J.) & CO. v. KNOWLES.

Asquith J.

it obligations to a third party is transferred from A to B, then, if the third party assents to the transfer in such circumstances that the transferee becomes directly liable to the third party on the self-same obligations as those of the transferor, the necessary inference is that the third party accepts the obligations of the transferee in substitution for those of the transferor, who is, accordingly, discharged. Mr. Denning relied, as illustrating this proposition, mainly on cases decided under the law of partnership, such as *Bilborough* v. *Holmes* (1), and on cases such as *Morton's* case (2). In that case X agreed to take shares from a statutory corporation, and transferred them to Y, who, with the knowledge of the corporation, was placed on the register, and it was held that this amounted to a novation and X was discharged from liability for calls. On the other hand, Mr. Wynn Parry, for the lessors, argued that such cases have no application to the sphere of landlord and tenant with its peculiar incidents of privity of estate and the like. He contended that the defendant's argument was based on the alleged existence of an implied term, and that the defendant had to show, and had failed to show, that when a similar covenant was exacted from the second assign, this must, by necessary implication, release the first assign. He stressed that the defendant was under an express obligation to pay the rent and perform the covenants during the residue of the term, and contended that in para. (*p*) of the lease the lessors were stipulating for as many obligations as there were assigns. The object of para. (*p*) and of the deeds of licence must have been, he argued, to add to the rights which the lessors would have had at common law, and that their intention and effect were, inter alia, to destroy the immunity of an assign who re-assigned.

The matter is largely one of first impression. According to the best consideration that I can give to the matter, the lessors' argument prevails. I do not think that the object of para. (*p*) is merely to enable the landlord to enforce against an assign, during the term while he remains an assign, covenants which do not run with the land, if indeed there be any such covenants in this particular deed. I think the object is to bind each and all of the successive assigns, if there be more than one, by the covenants in the lease including the covenant to pay rent, and to bind them for the whole residue of the term, and that the implied term contended for by the defendant is not made out. I do not think that Mr. Denning's general proposition, though argued with all his usual learning and acuteness, will hold water.

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(1) (1876) 5 Ch. D. 255, 260, 261.

(2) (1873) L. R. 16 Eq. 104.

In the result, there must be judgment for the plaintiffs for the sum claimed, with costs.

Solicitors for lessors: *Bartlett & Gluckstein.*
Solicitors for defendant: *Rubinstein, Nash & Co.*

A. W. G.

CHANDLESS-CHANDLESS *v.* NICHOLSON.

C. A.
1942
July 24.

Landlord and tenant—Lease—Relief from forfeiture—Conditional order—Conditions to be complied with within specified time—Failure to comply with conditions within specified time—Extension of time for compliance—Practice—Consent order—Form.

Where an order for relief against forfeiture of a lease is granted to a tenant on terms to be performed within a specified time, the court has jurisdiction to extend that time if circumstances are brought to its notice which would make it just and equitable that extension should be granted. Where on all equitable grounds a period of limitation ought in fairness to be extended and its extension will do no more than apply the principle that the condition of re-entry is no more than security for the rent, there is no reason why equity should not lend its aid and extend the period. This is so although the order which prescribes the limitation of time does not give the tenant liberty to apply.

If an order is made by consent it should on the face of it invariably be expressed so to have been made.

APPEAL from Asquith J.

The plaintiff was the ground landlord of a dwelling-house, the applicant, Mrs. Wimborne, being the tenant under a lease for a term of sixty-five years from Michaelmas, 1889, at a rent of 12*l.* a year. Mrs. Wimborne sublet the house to three tenants each of whom occupied part of the house. She went abroad and made default in payment of the half-year's ground rent due March 25, 1940. The plaintiff had difficulty in tracing her, and on June 11, 1940, he obtained judgment in an action against the defendant, one of the sub-tenants, for possession. Later, Mrs. Wimborne applied for relief against forfeiture, and on September 12, 1941, an order was made by Master Ball granting that relief on the terms that within

C. A.
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Chandless-Chandless v. Nicholson.

three months she should pay the outstanding ground rent amounting to 18*l.*, the taxed costs of the action for possession, and the taxed costs of the application for relief; should discharge the liability under the War Damage Act; and, by para. 5, should "deal and dispose of the claim for "schedule A." Mrs. Wimborne complied with the terms except such part of the sch. A tax as was referable to her beneficial interest in the lease, with regard to which tax she had claims for relief which, it was arranged, should stand over, and so it was not disposed of within the three months specified in the terms. In March, 1942, the plaintiff paid the sch. A tax without reference to any tax reliefs to which Mrs. Wimborne might have been entitled, and he did not inform her or her advisers that he had done so until later. On May 12, 1942, Mrs. Wimborne took out a summons asking for relief against forfeiture simpliciter. The summons came before Master Baker, and it was proposed on behalf of Mrs. Wimborne that the period of three months specified in the original order should be extended in view of the fact that the tax claim was standing over by arrangement. Master Baker took the view that he had no jurisdiction to deal with the application because Master Ball's order did not in terms reserve liberty to apply. Mrs. Wimborne then took out a summons, returnable before Master Ball, asking for his order to be amended by inserting "liberty to apply," but Master Ball held that he had no power to insert those words in the order and that the order was a consent order, although it was not so stated therein. On appeal Asquith J. held that, as the three months had elapsed without the order being complied with, he had no jurisdiction to deal with the appeal, and he dismissed it. Mrs. Wimborne appealed.

H. H. Harris for Mrs. Wimborne. The plaintiff has been paid the rent in full without his having to enter into possession of the house, and it was in no way Mrs. Wimborne's fault that she was unable fully to comply with the order of September 12, 1941, in the time specified. It cannot be right in the circumstances that every way of her obtaining relief from forfeiture should be barred. Sect. 46 of the Supreme Court of Judicature (Consolidation) Act, 1925, gives the court the widest discretion in granting such relief to a tenant: *Nance* v. *Naylor* (1). The grounds on which relief against

(1) [1928] 1 K. B. 263.

forfeiture was given by courts of equity were dealt with by Stirling J. in *Howard* v. *Fanshawe* (1). The court should do all in its power to grant Mrs. Wimborne the relief she asks for.

Horner for the plaintiff. Where an order granting relief against the forfeiture of a lease is expressed to be made on the defendant performing certain conditions and the defendant fails to perform all the conditions, the order for relief must be treated as abandoned: *Talbot* v. *Blindell* (2). Mrs. Wimborne has not complied with the condition laid down in para. 5 of the order of September 12, 1940, and Asquith J. was, therefore, right in holding that he had no jurisdiction to deal with her appeal.

LORD GREENE M.R. The court, in exercising its jurisdiction to grant relief in cases of non-payment of rent is, of course, proceeding on the old principles of the court of equity which always regarded the condition of re-entry as being merely security for payment of the rent and gave relief if the landlord could get his rent. If an order of this kind, in which relief is granted on terms to be observed within a limited time, is to be treated as one which the court has no jurisdiction to modify in point of time even though circumstances justify modification, then the order becomes as vicious as the original forfeiture clause itself. I hold the view without hesitation that notwithstanding the omission of the words "liberty to "apply" an order of this kind, which gives relief on terms to be performed within a specified time, is one in respect of which the court retains jurisdiction to extend that time if circumstances are brought to its notice which would make it just and equitable that extension should be granted. It is obviously desirable, as the argument in this case has shown, that liberty to apply should be expressly reserved. If it had been reserved this litigation would never have taken the course which it has, because Master Baker ought to have granted the relief on the lines on which this court is disposed on the present occasion to grant it.

The next step which was taken was not by way of appeal from the order of Master Baker, but by way of a fresh summons returnable before Master Ball asking that the original order be amended by inserting "liberty to apply." On the view which I have expressed no such alteration of the order was necessary, but it was not unnatural that Mrs. Wimborne's

(1) [1895] 2 Ch. 581, 586–8.

(2) [1908] 2 K. B. 114.

advisers thought that that was their safest course. Master Ball, however, held that he had no power to insert those words in the order and, moreover, he held that the original order was a consent order. The original order which Master Ball made is not on its face expressed to be a consent order, and if it was a consent order it can only have been by a very regrettable mistake or inadvertence that that circumstance was not expressed in it. If an order is made by consent the practice should invariably be that it should on the face of it be expressed so to have been made. When the court finds an order which is not expressed to be made by consent it certainly is not going to treat it as a consent order unless it is satisfied that it was in fact a consent order. In the present case I am left in considerable doubt whether this order was a consent order in the strict sense. There is a great deal of difference between a consent order in the technical sense and an order which embodies provisions to which neither party objects. The mere fact that one side submits to an order does not make that order a consent order within the technical meaning of that expression, and I am not the least bit satisfied, having regard to the conflicting statements which we have before us as to how this order came to be drawn up, that it was a consent order in the technical sense. I cannot help thinking that at the time he made that order Master Ball cannot have so regarded it, because it is impossible to think that so learned and experienced a master, when he was making a consent order, should have disregarded what I apprehend is the universal practice of expressing on the face of the order that it is a consent order.

Asquith J. took the view that he had no power to deal with an appeal from the original order on the ground, apparently, that the original order had not been complied with, the three months had elapsed, and that, therefore, he had no power to interfere. That again, if I may say so with great respect, was regarding these orders, which are to give equitable relief, as something so immutable that the court is deprived of doing what in the circumstances of the case it considers to be equitable. It is not, of course, to be understood from anything I say that lessees who obtain orders for relief are entitled to treat the conditions laid down in them lightly. Any lessee who has obtained relief on conditions cannot expect to get further indulgence from the court in the matter of time unless good grounds are shown. Lessees must not think for one moment that they are entitled to be slack or casual about the performance of terms. If they are so and then endeavour to get further indulgence from the court, the court will know how to deal with them, but in a case where on all equitable grounds a period of limitation ought in fairness to be extended and its extension will do no more than apply the principle that the condition of re-entry is nothing more than security for the rent, there is no reason why equity should not lend its aid notwithstanding the original order. From that decision of Asquith J. the present appeal is brought.

I ought perhaps to mention a case which, we are told, affected Master Baker and was also not without influence on the learned judge. That is *Talbot* v. *Blindell* (1), where the order granting relief against forfeiture was made dependent on the tenants performing certain conditions. Having performed part of those conditions, they declined to perform the remainder and desired to waive the claim for relief. The landlord tried to compel them to perform the conditions. He failed because Walton J. pointed out that the order merely imposed conditions and did not contain an undertaking by the tenants to perform them, and, therefore, the landlord could not hold the tenants to performance. With great respect that case appears to me to have no application to anything with which we are concerned here.

It appears that, at any rate before Asquith J., an offer was made on behalf of Mrs. Wimborne to pay the sch. A tax which the plaintiff had paid. It is a great pity that the offer of repayment was not made earlier. The court does not expect that lessors will act in relation to forfeiture of leases otherwise than in accordance with those principles (which are well understood) on which the court gives relief. If, before Master Baker, the mind of the plaintiff had been in that condition it seems to me that the obvious and proper course would have been for him to say that he had paid the tax, and that he would not oppose an extension of the three months' period, or he would not hold the tenant to the precise terms of para. 5 of the original order, if Mrs. Wimborne was prepared to repay the amount of tax. If Master Baker had taken a proper view of his jurisdiction, he would have granted the relief asked for on those terms, but it seems that the matter assumed the shape of a battle of manœuvre in which the plaintiff, who, no doubt, is a man of business, and thought, as he was

(1) [1908] 2 K. B. 114.

entitled to think, that he had certain rights, was determined to get possession of the lease. It must not be taken that there is anything improper about that, but when the matter comes to be regarded by the court, and the court finds that the opportunity has been taken to get more out of the condition of re-entry than courts of equity have ever allowed it to have, then the court has to deal with the situation according to its own principles. In my opinion, the order which should have been made originally and which this court should make now, is that notwithstanding the terms of the original order of September 12, 1941, Mrs. Wimborne shall be relieved from the forfeiture on payment of the amount of the sch. A tax which has been paid and on payment of any costs which under the provision as to costs which I am about to mention fall to be paid by her to the plaintiff. It appears to me that justice will be done if no costs are given to either side before Asquith J. and Mrs. Wimborne has the costs of this appeal. If there are any outstanding costs unpaid there must be a set-off so as to ascertain whether any balance of costs is payable by Mrs. Wimborne to the plaintiff as a term of relief.

LORD CLAUSON. I agree both with the result which my Lord has stated and also with the reasons on which he has based the result.

Appeal allowed.

Solicitor for Mrs. Wimborne: *N. Mackover.*
Solicitors for plaintiff: *J. H. Hortin & Nash.*

P. J. B.

1942
July 24.

HANKEY *v.* CLAVERING.

Landlord and tenant—Lease—Termination—Notice—Validity—Error as to date of termination—Slip by landlord.

Under the terms of a lease for twenty-one years from December 25, 1934, either party could determine the tenancy at the end of seven years on giving six months' notice. The landlord gave to the tenant's solicitors a notice as from June 21, 1941, which purported to determine the lease on December 21, 1941. The solicitors subsequently acknowledged the receipt of this notice, saying that it had been properly served on them :—

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Held, that the notice, although the mistake as to date was obviously due to a slip on the part of the landlord, was invalid, and that the acceptance of its service by the solicitors did not cure the defect.

Cadby v. *Martinez* (1840) 11 Ad. & E. 720 followed.

APPEAL from Asquith J.

By a lease, dated June 10, 1935, the plaintiff demised certain premises to the defendant for a term of twenty-one years from December 25, 1934. The lease provided that: "If the lessee "shall desire to determine the present demise at the expiration "of the first three years and either party at the expiration of "the first seven or fourteen years of the said term and shall "give to the other party six calendar months' notice of such his "desire . . . . then immediately at the expiration of such "three, seven or fourteen years, as the case may be, the "present demise and everything herein contained shall cease "and be void." On January 15, 1940, the plaintiff wrote to the defendant's solicitors: "As I may have to be away for "some time in the near future, I will be obliged if you would "accept the six months' notice to terminate your client's lease "which I am allowed to give on June 21, 1941. This would "mean that he would have to give up the cottage on Decem"ber 21, 1941 . . . . Perhaps you would confirm you accept "this notice on his behalf." On March 5, 1940, the plaintiff again wrote to the defendant's solicitors reminding them that he had not received an answer to his letter of January 15, and asking them to confirm that they had accepted the notice which he gave in that letter terminating the defendant's lease. On March 8, 1940, the solicitors replied acknowledging receipt of both letters, and concluding: "Our instructions are such "that we are able to inform you that the notice therein "contained is properly served upon us." The defendant refused to give up possession of the premises, and the plaintiff began this action, claiming possession. Asquith J. held in favour of the plaintiff, and the defendant appealed.

Denning K.C. and *Scott Cairns* for the defendant. The plaintiff by his notice attempted to do that which he had no power to do, namely, to terminate the tenancy on December 21, 1941. The invalidity of such a notice is not cured by showing that the other party understood what was meant: *Cadby* v. *Martinez* (1). The date of determination must be the right date: per Atkin L.J. in *P. Phips & Co.* v. *Rogers* (1). That is the principle underlying these cases: see Cole on Ejectment, pp. 31-32, where *Johnstone* v. *Hudlestone* (2) and other cases are cited, and pp. 53, 398. A notice such as that in question here must be construed strictly. [*In re Bebington's Tenancy* (3) was also referred to.]

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(1) [1840] 11 Ad. & E. 720.

Blanco White K.C. and *Holroyd Pearce* for the plaintiff. A notice to quit will, if it is possible, be so construed as to give effect to its intention: *Duke of Bedford* v. *Kightley* (4). If a notice can be understood by a reasonable person it is a good notice: *Doe* v. *Culliford* (5) and *Wride* v. *Dyer* (6). Here the plaintiff, by error, gave notice to quit on December 21 instead of on December 25, a matter of only four days. Any reasonable person could understand what was meant, and the letter of the defendant's solicitors of March 8, 1940, showed that they, on behalf of the defendant, accepted the notice. The notice was, therefore, good.

LORD GREENE M.R. This appeal raises a short point in connection with a break clause in a lease wherein the plaintiff was the lessor and the defendant was the lessee. By his letter of January 15, 1940, the plaintiff, on the face of it, was purporting to determine the lease by notice on December 21, 1941. The whole thing was obviously a slip on his part, and there is a natural temptation to put a strained construction on language in aid of people who have been unfortunate enough to make slips. That, however, is a temptation which must be resisted, because documents are not to be strained and principles of construction are not to be outraged in order to do what may appear to be fair in an individual case.

The learned judge did not express any concluded opinion on the first question that arises on this appeal, and that question is whether or not that notice is a good notice which had the effect by its own force of bringing the demise to an end and accordingly terminating the estate of the lessee on the correct date, that is to say, December 25, 1941. It appears that the inclination of his mind was to answer that question in favour of the defendant, but he did not find it necessary to express a concluded opinion, because he decided the matter in favour of the plaintiff upon another ground altogether. It

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(1) [1925] 1 K. B. 14, 27.
(2) (1825) 4 B. & C. 922.
(3) [1921] 1 Ch. 559, 564-5.
(4) (1797) 7 Term Rep. 63.
(5) (1824) 4 Dowl. & R. 248.
(6) [1900] 1 Q. B. 23.

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will be convenient if I deal with the other ground first. [His Lordship read the letters above set out, and continued:] The learned judge approached the question in this way. He said that the last sentence in the letter of January 15, "Perhaps "you would confirm you accept this notice on his behalf," was a request for an assurance that the notice was accepted as valid, that is to say, that notwithstanding the mistake in the date the notice was accepted as a valid notice to determine the lease on December 25. That is the way in which the learned judge construed that sentence, and when he came to deal with the last sentence in the letter of March 8 he construed that as an admission by the solicitors that the notice was a proper notice in that sense. With all deference to the learned judge, in my opinion that is an incorrect interpretation of the documents. The request in the letter of January 15, 1940, was quite clearly made for the reason that under the lease the only person upon whom the notice could be served was the tenant himself, and, therefore, the plaintiff very sensibly, when he gave the notice to the defendant's solicitors, asked them if they would accept the notice on his behalf. The solicitors when they reply do so in what is obviously very carefully chosen language; they dislike the word "accept" and they avoid it; they do not even go so far as to say that they accept the notice. That seems to me to mean nothing more than this: "So far as service is concerned, the document "can be taken as properly served notwithstanding that it "was served not upon the proper person, namely, the tenant, "but only upon us, his solicitors." If that be the true construction—and it is my view that that is the true construction—it becomes quite unnecessary to go into the further question whether or not this could in any circumstances be construed as an agreement for surrender, particularly when no such point was pleaded and there was no evidence of any authority in the solicitors to enter into an agreement to surrender. On this point, therefore, I disagree with the learned judge.

That takes me back to the real point, namely, whether or not the notice was good, in the sense that it had the effect of terminating the lease on December 25, 1941. Notices of this kind are documents of a technical nature, technical because they are not consensual documents, but, if they are in proper form, they have of their own force without any assent by the recipient the effect of bringing the demise to an end. They must on their face and on a fair and reasonable construction

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do what the lease provides that they are to do. It is perfectly true that in construing such a document, as in construing all documents, the court in a case of ambiguity will lean in favour of reading the document in such a way as to give it validity, but I dissent entirely from the proposition that, where a document is clear and specific, but inaccurate on some matter, such as that of date, it is possible to ignore the inaccuracy and substitute the correct date or other particular because it appears that the error was inserted by a slip. By the clear wording of this notice the plaintiff purported to bring the lease to an end on December 21, 1941. In so doing he was attempting to do something which he had no power to do, and, however much the recipient might guess, or however certain he might be, that it was a mere slip, that would not cure the defect because the document was never capable on its face of producing the necessary legal consequence. The authority for that proposition is *Cadby* v. *Martinez* (1), a case of the highest authority in these matters. There, in a lease for twenty-one years from Michaelmas, 1823, there was a power to the tenant to determine at the end of the first fourteen years on giving six calendar months' previous notice in writing. Six months before the June preceding the expiration of the first fourteen years the tenant gave notice that he would quit on June 24, 1837, agreeably to the covenants of the lease. As the notice could only be a notice to determine at Michaelmas, 1837, he put in a wrong date. There was evidence that the landlord understood the notice to refer to Michaelmas, but it was held that the question whether or not he so understood it could not be put to the jury because it was irrelevant. However he understood the document, it was not that instrument which, according to the terms of the lease, was required to be brought into existence to terminate the demise. Lord Denman, who delivered the judgment of the court, dealt thus with the suggestion that the defect was cured by the plaintiff's conduct in acknowledging the receipt of the letter (1): "We . . . . are of opinion that the covenant "to pay rent during the whole term cannot be got rid of by "any notice to quit which is not in accordance with the "proviso introduced into the lease for the purpose." He treated the matter as one of great clearness, as, indeed, I think it is.

In my opinion, therefore, the appeal should be allowed, with the result that the action be dismissed with costs.

(1) 11 Ad. & E. 720.

LORD CLAUSON. I agree. This case seems to me to turn purely, on the first point of construction, on the letter of January 15, and on the second point on the solicitors' letter of March 8, 1940. I do not propose to add anything to what my Lord has said, except this. I have listened with I hope due care to the arguments placed before us and I must confess I have been unable to entertain the faintest doubt as to the true meaning and true construction of each of these letters. But for the very interesting submissions to which we have listened, I should have thought that, as a matter of construction, an argument other than that which leads to the result the Master of the Rolls has announced was quite untenable.

Appeal allowed.

Solicitors for defendant: *Arthur Pyke & Co.*
Solicitors for plaintiff: *Druces & Attlee.*

(1) 11 Ad. & E. 720, 726.

P. J. B.

MISCHEFF *v.* SPRINGETT.

1942
July 29.

Emergency legislation—Price control—"Sale"—Contract for unascertained goods made before date of order—Appropriation of goods to contract after order in force—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 1, *sub-s.* 4—*Canned Sardines (Maximum Prices) Order*, 1941 (*St. R. & O.*, 1941, *No.* 671).

By a contract in writing of April 11, 1941, the appellant agreed to sell to M. 300 cases of sardines at the price of 14*s.* 3*d.* per dozen tins. The sardines formed an unidentified part of a quantity of 864 cases, then in transit at sea, which had been agreed to be sold to the appellant by B. at 13*s.* 9*d.* per dozen tins. On May 19, 1941, the Canned Sardines (Maximum Prices) Order, 1941, came into force prohibiting the sale of sardines at a price exceeding the maximum price of 10*s.* 9*d.* per dozen tins. On May 20, 1941, B. sent an invoice and delivery order to the appellant for 864 cases at 13*s.* 9*d.* per dozen tins, which price was paid by the appellant. On May 21, 1941, the appellant sent to M. an invoice and a delivery order for 300 cases at 14*s.* 3*d.* per dozen tins, which price was paid by M. In proceedings against the appellant for making a sale in contravention of the order:—

Held, that the words "sell" and "sale" in the order must be given the same meaning as they bear in the Sale of Goods Act,

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Reported by P. B. Durnford, Esq., Barrister-at-Law.

1893; that, by s. 1, sub-s. 3, of that Act, the contract of sale of April 11, 1941, was a mere agreement to sell, but that, by s. 1, sub-s. 4, on the transference of the property in the goods by the sending of an invoice and a delivery order for them, it became a sale within the order, notwithstanding the fact that the acts which passed the property in the goods were referable to an agreement to sell which was entered into before the order came into force; and that, therefore, the appellant had committed an offence against the order.

CASE stated by the Lord Mayor of London.

An information was preferred by the respondent, Laurence Springett, an enforcement officer of the Ministry of Food, under the Canned Sardines (Maximum Prices) Order, 1941, and reg. 55 of the Defence (General) Regulations, 1939, made pursuant to the Emergency Powers (Defence) Act, 1939, against the appellant, Kiril Mischeff, for that he, on or about May 21, 1941, at 10, Eastcheap, in the city of London, otherwise than under and in accordance with the terms of a licence granted by or on behalf of the Minister of Food, unlawfully did sell to McCrackens, Ld., of 2, Bronté Street, Liverpool, 300 cases of canned sardines at a price exceeding the appropriate maximum price under the order.

At the hearing the following facts were proved or admitted. By a contract in writing dated April 11, 1941, the appellant agreed to sell to McCrackens, Ld., 300 cases of sardines at a price of 14*s.* 3*d.* per dozen tins, less half per cent. in lieu of ten per cent. examination, the goods being then at sea. The goods formed an unidentified part of a quantity of 864 cases of sardines agreed to be sold to the appellant by Ernest Butcher (Great Britain), Ld., at a price of 13*s.* 9*d.* per dozen tins less half per cent. in lieu of ten per cent. examination, by a contract in writing dated April 9, 1941. On May 19, 1941, the Canned Sardines (Maximum Prices) Order, 1941, came into force, whereby the maximum price on a sale by wholesale (that being the proper definition of the sale in the present case) was fixed at 89*s.* 7*d.* per case of 100 containers, or the equivalent of 10*s.* 9*d.* per dozen tins (1). On May 20, 1941, Ernest Butcher (Great Britain), Ld., sent an invoice and a

(1) By Canned Sardines (Maximum Prices) Order, 1941, art. 2: "Except under and in accordance "with the terms of a licence "granted by or on behalf of the "Minister of Food no person shall "sell or agree to sell or offer or "expose for sale or buy or agree or "offer to buy any canned sardines "at a price exceeding the appro- "priate maximum price ascer- "tained in accordance with parts

delivery order to the appellant for 864 cases of sardines at the rate of 13*s.* 9*d.* per dozen tins and the appellant paid the price specified. On May 21, 1941, the appellant sent an invoice and a delivery order to McCrackens, Ld., for 300 cases of sardines at the rate of 14*s.* 3*d.* per dozen tins, which McCrackens, Ld. paid. There had been no appropriation of any of the goods to either of the contracts before May 20 and May 21, 1942, respectively.

The Lord Mayor of London held that by s. 1, sub-s. 3, of the Sale of Goods Act, 1893, the contract of April 11, 1941, was no more than an agreement to sell, and that, by s. 1, sub-s. 1, s. 16, and s. 18, r. 5, there was no sale until May 21, 1941, when the goods to which the agreement to sell referred were ascertained and appropriated to the contract, and that, accordingly, there was a sale on May 21, contrary to the order. He imposed on the appellant a fine of 1*l.* together with ten guineas costs. The appellant appealed.

Sergeant Sullivan K.C. and *Raeburn* for the appellant. A statutory order must, if reasonably possible, be construed so as not to interfere with existing rights nor to annul existing contracts. There was a sale on April 11 and the sending of the

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"I. and II. of the schedule to this "order, subject to the provisions of "part III. of the said schedule."

By Sale of Goods Act, 1893, s. 1, sub-s. 1: "A contract of sale of "goods is a contract whereby the "seller transfers or agrees to "transfer the property in goods "to the buyer for a money con-"sideration, called the price."

By sub-s. 3: "Where under a "contract of sale the property in "the goods is transferred from the "seller to the buyer the contract "is called a sale; but where the "transfer of the property in the "goods is to take place at a "future time or subject to some "condition thereafter to be ful-"filled the contract is called an "agreement to sell." By sub-s. 4: "An agreement to sell becomes a "sale when the time elapses or "the conditions are fulfilled sub-"ject to which the property in the "goods is to be transferred."

By s. 16: "Where there is a "contract for the sale of unascer-"tained goods no property in the "goods is transferred to the buyer "unless and until the goods are "ascertained."

By s. 18, r. 5 (1): "Where there "is a contract for the sale of "unascertained or future goods "by description, and goods of "that description and in a deliver-"able state are unconditionally "appropriated to the contract, ". . . . the property in the goods "thereupon passes to the buyer ". . . ."

By s. 62, sub-s. 1: "In this "Act . . . . 'contract of sale' "includes an agreement to sell as "well as a sale. . . . . 'Sale' "includes a bargain and sale as "well as a sale and delivery."

invoice and the delivery order on May 21, was only growth that brought that sale to maturity. It did not constitute a new sale. Before the property in goods comprised in an undivided cargo passes to a purchaser of a portion of the goods under the rules of the Sale of Goods Act, the purchaser of a parcel of goods has an equitable interest in them: see per Lord Blackburn in *Inglis* v. *Stock* (1). That case is treated in Chalmers' Sale of Goods, 11th ed., p. 61, as possibly supporting the proposition that, although there has been no segregation of goods to a contract, the sale of an undivided portion will constitute the purchaser a tenant in common of the goods with the other purchasers.

G. O. Slade for respondent. In *Clarke* v. *Taylor* (2) it was decided in circumstances practically identical with those of the present case, that there had been a sale after the date on which the order there in question came into force. By s. 16 of the Sale of Goods Act, no property passes in the case of a sale of unascertained goods until the goods are ascertained, and the passing of the property then constitutes a sale. The real meaning of the order is that "no person shall enter into "a contract of sale, and no person shall perform an agreement "to sell," after the material date. A contract to sell unascertained goods is not a complete sale, but a promise to sell. There must be added some act, such as delivery or the appropriation of specific goods to the contract which completes the sale: per Lord Loreburn in *Badische Anilin und Soda Fabrik* v. *Hickson* (3). The act which has to be added constitutes the sale, and in the present case the act was the sending of the invoice and the delivery order on May 21. In any event, if there was a contract in existence at the time of the making of the order, it was frustrated when the order came into force.

VISCOUNT CALDECOTE C.J. The contract of April 11, 1941, was an agreement to sell within the meaning of s. 1, sub-s. 3, of the Sale of Goods Act, 1893. It was made before the Canned Sardines (Maximum Prices) Order came into force. It was, consequently, legal, and there was nothing to prevent it from being carried out. There is no suggestion that any agreement to sell was made after the order came into force, but it was contended on behalf of the respondent that there

(1) (1885) 10 A. C. 263, 274.

(2) Unrep., Jan. 30, 1942, Wrottesley J.

(3) [1906] A. C. 419, 421.

was a sale after the date of the order, namely, when the invoice and the delivery order of the goods were presented, delivery of the goods obtained, and the price paid. In support of this contention reliance is placed on s. 1, sub-s. 4, of the Sale of Goods Act.

Some light is thrown on the question which we have to determine by a passage from the speech of Lord Loreburn L.C. in *Badische Anilin und Soda Fabrik* v. *Hickson* (1) where he said: "A contract to sell unascertained goods is not a com- "plete sale, but a promise to sell. There must be added to it "some act which completes the sale, such as delivery or the "appropriation of specific goods to the contract by the assent, "express or implied, of both buyer and seller." The question for us here is whether the act which has to be added to the agreement to sell unascertained goods so as to complete the sale comes within the meaning of the word "sell" in the order. I have come to the conclusion that the view taken by the magistrate was right. We have been referred to the definitions of "contract of sale" and "sale" in s. 62 of the Act. It is there stated that "contract of sale" includes an agreement to sell as well as a sale, showing clearly that "agreement to sell" and "sell" are distinct and have different effects. The section also states that "sale" includes a bargain and sale as well as a sale and delivery, but I cannot see that that definition throws any light on the question we have to determine. In this connection I think it right to say that, in looking at the definition section in an Act of Parliament, one must remember that the definitions given therein are those of the words or expressions defined in the sense in which they are used in the Act in which they are found, and to arrive at a right decision one must look at the substantive part of the Act and not merely to the definition.

Returning to s. 1, sub-s. 4, I come to the conclusion that its language covers the facts of this case, and that the agreement to sell made by the appellant on April 11, 1941, matured, to use his counsel's expression, into a sale, when the conditions were fulfilled subject to which the property in the goods was to be transferred, that is to say, on the arrival of the ship and the ascertainment of the goods which were the subject of the agreement to sell. We were referred to the decision of this court in *Clarke* v. *Taylor* (2) in which, so far as I understand the judgment of Wrottesley J., he came to the same conclusion

(1) [1906] A. C. 419, 421. (2) Unrep., Jan. 30, 1942, Wrottesley J.

1942

Mischeff v. Springett.

Viscount Caldecote C.J.

as that at which I have arrived. As, however, the facts of that case do not very clearly appear from the case there stated and we do not know the arguments which were presented to the court, I am prepared to base my judgment on my reading of the effect of s. 1, sub-s. 4, and to hold that the act which was done in this case passed the property in the goods and constituted a sale notwithstanding the fact that the act in question was referable to an agreement for sale entered into at an earlier time. In my judgment, therefore, the magistrate came to a correct decision in point of law and the appeal must be dismissed.

Tucker J. I agree. We have to determine what is the meaning of " sell " in art. 2 of the Canned Sardines (Maximum Prices) Order, 1941. It is conceded that no offence has been committed in this case unless the completing into a sale, after the order came into force, of what was a perfectly legitimate agreement to sell, constitutes an offence. In my view, in a commercial transaction of this kind the word " sell " or " sale " must be given the meaning which it bears in the Sale of Goods Act, and it is clear that in the Sale of Goods Act the word " sale " necessarily implies something under which the property in the goods has passed and includes a contract under which the goods have passed. That may occur under the contract itself whereby the goods pass, or it may take place when what had previously only been an agreement to sell becomes a sale under the provisions of s. 1, sub-s. 4. Counsel for the appellant prayed in aid the definition of sale in s. 62 in that it " includes a bargain and sale as well as a "sale and delivery." Action for goods bargained and sold is a well known form of action and the necessary ingredients for it will be found in Bullen and Leake's Precedents of Pleadings, 3rd ed., p. 38, where it is said " Goods bargained and "sold. This count lies where upon a sale of goods the "property has passed to the purchaser, and the contract "has been completed in all respects except delivery, and "the delivery was not a part of the consideration for the "price or a condition precedent to its payment." I think that everything in the Sale of Goods Act goes to show that the words " sale " or " sell " when contrasted with the words "agree to sell " or " agreement to sell," necessarily involve something under which the property in the goods has been made to pass, and that, therefore, in this case a sale under art. 2 of the order took place when that was done which made the previously existing agreement to sell become a sale, namely, when the goods were appropriated and the property in them passed to the buyer. I agree that the decision of the magistrate was right.

BIRKETT J. I agree.

Appeal dismissed.

Solicitors for appellant: *J. M. Menassé & Co.*
Solicitor for respondent: *Treasury Solicitor.*

END OF VOL. II. AND OF KING'S BENCH SERIES FOR 1942.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1942, will be as follows :—

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